

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

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7 BEECHWOOD RESTORATIVE CARE ) 02-CV-6235(L)  
CENTER, BROOK CHAMBERY AND )  
8 OLIVE CHAMBERY, )  
Plaintiffs )  
9 vs. ) Rochester, New York  
10 LAURA E. LEEDS, EDMUND RUSSELL ) May 15, 2012  
ALTONE, SANFORD RUBIN, ) 8:30 a.m.  
11 SUSAN T. BAKER, SHARON A. CARLO, )  
CYNTHIA T. and ELIZABETH RICH, )  
12 Defendants. )  
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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAVID G. LARIMER  
UNITED STATES DISTRICT JUDGE

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3 Preliminary charge by Judge Larimer Page 4

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## PROCEEDINGS

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3 (WHEREUPON, the jury is not present).

4 THE COURT: Ready for the jury?

08:36AM 5 MR. COOMAN: Your Honor, if I just may bring two things  
6 to your attention? Mrs. Chambery is in the courtroom this morning  
7 seated with me at the table.

8 Also, my colleague Mr. Rothenberg is not feeling well.

9 He was at the doctor at 7:30 this morning and not likely to be  
08:37AM 10 here for the day. He's hoping it's the flu and not something  
11 more, but I just wanted to explain his absence this morning.

12                   THE COURT: Well, I have some other issues too. Perfect  
13 storm, but in any event, I guess we're otherwise ready to proceed?  
14 And we'll talk about that issue.

08:37AM 15 Good morning, Mrs. Chambery.

16 Let's get our jurors in and we will proceed. Good  
17 morning to all parties and of course to you, Mr. Levine.

18 | MR. LEVINE: Thank you, Judge.

19 THE COURT: I'll do my remarks and I think we'll take a  
08:38AM 20 break and let you set up.

21 (WHEREUPON, the jury is present).

22 THE COURT: Good morning, ladies and gentlemen. We are  
23 ready to proceed. And as I told you yesterday, the first thing we  
24 will do this morning is to present to you my opening charge on the  
08:39AM 25 law. I am sure at the end of the case there will be some

1 additions because things will occur during the trial which  
2 necessitate my saying some additional things, but I think much of  
3 what you'll hear now you'll also hear at the end of the case.

4                   As I said yesterday, it just seems to make sense to me  
08:39AM 5 to let jurors know from the beginning some of the rules that are  
6 going to guide your consideration of this case rather than wait  
7 four or five weeks and tell you at the end of the case.

8                   I think you have notebooks, but you don't have to take  
9 notes here. We'll talk about notes in a minute during the trial,  
08:40AM 10 but just listen. I think this will help you; and the lawyers in  
11 their opening statements may refer to some of the things I talk  
12 about, too.

13                   In effect, in any trial there are really two judges. I  
14 am obviously one of them: I'm the judge of the law. You're the  
08:40AM 15 judges of the facts here: You decide the factual issues in this  
16 case. And that's such a strong rule that if I were to tell you,  
17 you know, I think this is what the facts are, you have a complete  
18 right to disregard that because that's not my province. I would  
19 never say that, but I say it just as an example to show you how  
08:41AM 20 important your job is.

21                   I must preside over the case to make sure that it's run  
22 orderly and efficiently, make sure only legal evidence is  
23 presented to you, and now my task is to instruct you on the law.

24                   You should consider all of my instructions on the law,  
08:41AM 25 not pick out one particular instruction as covering the whole

1 issue to be decided. You also can't substitute your notion or  
2 opinion as to what the law should be. No. You're charged with  
3 following the law and deciding this case regardless of the  
4 consequences.

08:41AM 5 The parties expect that you'll carefully and impartially  
6 consider the evidence, not be governed by sympathy, prejudice or  
7 public opinion, but that you'll reach a just verdict regardless of  
8 the consequences.

9 We talked quite a bit about some of the issues  
08:42AM 10 yesterday, so some of this will be repetitive, but Mr. Chambery,  
11 the plaintiff who was introduced to you yesterday, is suing seven  
12 State Department of Health employees, present or former. The  
13 allegation is that all were involved in investigating or reviewing  
14 the operation of the Beechwood nursing home before, during and to  
08:42AM 15 some extent in 1999, which seems to be the crucial years in  
16 question here.

17 Eventually I believe you'll hear that after the review  
18 process action was taken against Beechwood which led to Beechwood,  
19 Mr. Chambery losing its operating certificate, which precluded him  
08:42AM 20 from running the nursing home, the plaintiff claims that his  
21 constitutional rights were violated in this process. He claims he  
22 was targeted and retaliated against for complaining to the  
23 Department of Health and about the Department of Health, about its  
24 policies, regulations, et cetera.

08:43AM 25 And his complaints, I think you'll hear, took many

1 forms. The gist of his claim here is the Department of Health  
2 officials were angered by that, upset by it and they took action  
3 against him because of that.

4 As I said yesterday, the defendants, each of them,  
08:43AM 5 denied that they had any improper motive for doing what they did.  
6 They reviewed Beechwood's activities, they found problems and they  
7 did what they felt was necessary to do without any motivation to  
8 retaliate against Mr. Chambery for his speech.

9 Mr. Chambery and Beechwood brings this action to recover  
08:44AM 10 damages for the loss of the business. As I said yesterday, we are  
11 focusing on a constitutional violation, and that's important to  
12 remember because the claim is very specific: That Mr. Chambery  
13 was punished or retaliated against in violation of his  
14 constitutional rights.

15 I'm sure you're all familiar with the Constitution, read  
16 it often. But Article I of the First Amendment to the  
17 Constitution provides for many things. One is that when it was  
18 originally written, the law was just directed against Congress,  
19 the federal government. But over the years the Constitution has  
08:44AM 20 interpreted that it also applies to state governments and local  
21 governments.

22 So essentially now the First Amendment, as interpreted,  
23 means that no governmental body shall make any law or take any  
24 action prohibiting the free exercise of speech or abridging the  
08:45AM 25 freedom of speech. Also shall make no law preventing individuals

1 from petitioning the government for what's called a "redress of  
2 grievances." It's that amendment that Mr. Chambery believes was  
3 violated.

4                   As I said to you yesterday, we are here because Congress  
08:45AM 5 passed a statute that says people that believe their rights were  
6 so violated have the right to come into federal court to attempt  
7 to prove their case. The statute is not a model of draftsmanship,  
8 but it essentially says that any person under color of law that  
9 subjects or causes another person or a citizen of the United  
08:46AM 10 States to the deprivation of any rights and privileges protected  
11 by the Constitution, that person who does that shall be liable in  
12 an action at law.

13                   That basically means there's a vehicle, there's a remedy  
14 in federal court against someone who causes the deprivation of  
08:46AM 15 rights protected by the Constitution, whether it's the First  
16 Amendment, the Fourth Amendment, the Fifth Amendment or whatever  
17 it might be.

18                   So there are several things that the plaintiff must  
19 prove here. At least one of them is not disputed at all and you  
08:47AM 20 won't hear anything more about it, and others really I don't think  
21 there is much dispute.

22                   There is one element here that is very much in dispute,  
23 but Mr. Chambery, to prove his case against the defendants, must  
24 first establish that he engaged in speech or activity that was  
08:47AM 25 protected by the First Amendment. I think you'll hear some

1 testimony about what Mr. Chambery did and when he did it and the  
2 nature of it, but I don't really think that the defense really  
3 contends that Mr. Chambery didn't engage in protected speech.

4 The next thing is that Mr. Chambery must establish that  
08:47AM 5 the defendants took some adverse action against him, but that what  
6 they did was detrimental to him. I think Mr. Chambery will  
7 testify, and Mr. Cooman in his opening will talk about the things  
8 that Mr. Chambery says were done adverse to him because of his  
9 speech.

08:48AM 10 The next thing which is an element or aspect of the case  
11 is that the action, the adverse action, must have been done under  
12 color of law. I wasn't even going to mention this because it's  
13 really not an issue here, but what it means is that if your  
14 neighbor, who is not a government official, takes some action  
08:48AM 15 against you, tries to get you not to engage in free speech or  
16 something, that's not actionable here.

17 What's actionable is government action. That the  
18 government can't limit your speech or retaliate against you. So,  
19 for instance, sometimes there are cases where a government agent  
08:49AM 20 does something against somebody and the question is was he or she  
21 doing it as part of his job or her job.

22 In other words, just because you happen to be, you know,  
23 a government agent and you do some wrongful act, if it's not part  
24 of your job, if you're not acting as a state official, then it's  
08:49AM 25 not covered by the statute.

1                   Well, again, I spoke too much about this because it's  
2 something that's not really an issue. Nobody disputes that the  
3 Department of Health officials when they did what they did, they  
4 were acting in their official capacities as state officers, state  
08:49AM 5 agents. They weren't private citizens. So you'll probably never  
6 hear about this aspect again and I probably talked too much about  
7 it already since it's not really in dispute.

8                   I think the focus on the case is about government  
9 agents, government actors taking certain action as part of their  
08:50AM 10 job for the government.

11                  The next element, if you will, or requirement is that  
12 the actions taken against Mr. Chambery were done because of  
13 something, and specifically Mr. Chambery must prove that his  
14 protected speech was a motivating factor in the defendants'  
08:50AM 15 decision to take adverse actions against him.

16                  I don't think I'm giving away any secrets here that this  
17 is probably one of the most disputed issues in the case, that is,  
18 was Mr. Chambery's protected speech the motivating factor for the  
19 defendants to do what they did when they did it?

08:51AM 20                  The last thing is that the adverse action caused by the  
21 defendants, was it the proximate cause of the injuries about which  
22 Mr. Chambery complains?

23                  So there are those five aspects or elements, one of  
24 which, that is, under color of state law, really is not disputed.  
08:51AM 25 Nobody will probably talk about it further.

1           I instruct you that if a person complains or protests or  
2 files lawsuits against a governmental agency, is critical of that  
3 agency, a person has a right to engage in that type of speech;  
4 it's protected speech.

08:52AM 5           This case is brought by Brook Chambery. The complaint  
6 also lists Olive Chambery, his mother, who happens to have joined  
7 us here in court this morning. It's not necessary that plaintiff  
8 prove that both Chamberys engaged in protected speech. No. It's  
9 just whether one did, and I think the proof will show that  
08:52AM 10 Mr. Chambery engaged in what we call "protected speech" or  
11 "protected activity."

12           The next element is that the plaintiffs must show that  
13 there was some action taken against him because of the speech. I  
14 really don't think there's going to be much dispute that there was  
08:52AM 15 some adverse action taken against Mr. Chambery and Beechwood.  
16 Certain things were done, letters were filed, eventually leading  
17 to the revocation of something called an "operating certificate"  
18 that allows one to run a nursing home. And there were other  
19 actions taken which essentially put Mr. Chambery and Beechwood out  
08:53AM 20 of business. So I really don't think there's going to be much  
21 dispute about the State took adverse action against Mr. Chambery  
22 and Beechwood.

23           To make out a claim under the First Amendment,  
24 Mr. Chambery must show that his protected speech was a motivating  
08:53AM 25 factor in the defendants' decision to take adverse action against

1 him. You may find that Mr. Chambery's protected speech and  
2 activity was a motivating factor if that speech played a  
3 substantial or important part in the defendants' decision. Did  
4 his speech enter into the decision? Did it play some part in the  
08:54AM 5 decision of the State officials to do what they did? Did it  
6 influence the decision in some way?

7 The defendants may have taken the action for many  
8 reasons, but if one of the reasons was Mr. Chambery's protected  
9 speech and their desire to get him or retaliate against him, then  
08:54AM 10 you may find that his speech played a substantial part in the  
11 decision to take action against the plaintiffs.

12 So I'm going to repeat this. Mr. Chambery's protected  
13 speech may be considered a motivating factor if that speech played  
14 a substantial or important part in the defendants' decision. Did  
08:55AM 15 his speech enter into the decision? Did it play some part in the  
16 decision to take action? Did it influence the decision? If you  
17 find any of those things, then you may find that, yes, his speech  
18 was a substantial or motivating factor in their decision to take  
19 action against him.

08:55AM 20 Finally, Mr. Chambery must prove that whatever damages  
21 or injuries he suffered was caused by the defendants' improperly  
22 motivated actions. Did his damage flow directly from the conduct  
23 that he's complained about?

24 Now, we talk here a lot about claims on one side or the  
08:55AM 25 other. Anyone who brings a lawsuit has an obligation to prove his

1 or her case. In this civil case, the law is that the plaintiff  
2 has to prove the case by a preponderance of the evidence. If  
3 after considering all the evidence presented here you feel that  
4 the plaintiff has established his case by a preponderance of the  
08:56AM 5 evidence, then you may find in favor of that plaintiff.

6 What do we mean by "preponderance of the evidence"?  
7 Language you probably haven't heard before. Preponderance of the  
8 evidence means to establish something or to prove that the fact is  
9 more likely true than not true. Preponderance of the evidence  
08:56AM 10 means the greater weight of the evidence. It refers to the  
11 quality and persuasiveness of the evidence, not to the number of  
12 witnesses or documents.

13 It has nothing to do with criminal law, which requires a  
14 party to prove the case beyond a reasonable doubt. That's not at  
08:56AM 15 all the test here. It's simply has the plaintiff established to  
16 your satisfaction that what he claims occurred is more likely true  
17 than not true.

18 I often use the visual image of the scales of justice.  
19 That if the scales tip, however slightly, in favor of the party  
08:57AM 20 having the burden of proof -- in this case the plaintiff -- we say  
21 that he has "met" his burden of proof. The scales don't have to  
22 flop over completely, but just tip in favor of the party having  
23 the burden of proof.

24 You should consider the testimony of all the witnesses,  
08:57AM 25 regardless of which side called them and produced them; all the

1 exhibits that will be received; there may be some stipulations and  
2 you may consider those as well.

3                   If you find the evidence is equal, well, that's not  
4 enough. The plaintiff has to prove more than equality of  
08:57AM 5 evidence. He must prove his case by a preponderance of the  
6 evidence. That is, that what he claims occurred is more likely  
7 true than not true. So keep that in mind as you listen to the  
8 case and the evidence.

9                   This is a case against seven defendants. You must  
08:58AM 10 consider each defendant separately. The plaintiff must prove his  
11 claim as to each defendant. At the end of the case I'm sure you  
12 will have a verdict sheet that will ask you your finding as to  
13 each defendant down the list. So you should keep that in mind.

14                   And if you are inclined to use notes, you might try to  
08:58AM 15 keep track as to what evidence relates to which particular  
16 defendant. Defendants must be personally involved in the activity  
17 that's claimed here.

18                   As I said several times, the defendants each of them  
19 deny that Mr. Chambery's speech, his complaints, et cetera, that  
08:59AM 20 they deny that that was a factor in their decision to take the  
21 action against Beechwood.

22                   The defendants also claim and raise as a defense that  
23 the defendants would have taken the same actions that they did  
24 even if the plaintiff had not exercised his First Amendment  
08:59AM 25 rights. In spite of his First Amendment speech, the defendants'

1 claim as a defense that they would have taken the same action that  
2 they did. To prove that defense, the defendants have the burden  
3 on that score.

4 I told you yesterday that you should not be influenced  
08:59AM 5 by anything outside the courtroom, and I repeat that and I tell  
6 you now that you must base your decision on the evidence that you  
7 hear here in court.

8 What do we mean by evidence? Well, we mean a couple of  
9 things. First of all, we mean the sworn testimony of the  
09:00AM 10 witnesses who will be here starting today to testify for you.

11 Both sides may call witnesses. You may consider it all certainly.

12 Any exhibits that will be received into evidence may be  
13 considered by you as evidence. I think you'll find most of the  
14 exhibits we have put or the lawyers have put on our computer  
09:00AM 15 system so that they will be shown to you on the monitors in front  
16 of you there, which I think will move things along. There may be  
17 some pieces of paper that end up getting shown to you, but most of  
18 it will be done on the computers.

19 You are to consider only the evidence in this case, but  
09:01AM 20 you're not limited to the bald statements of the witnesses. In  
21 other words, you're permitted to draw from the facts that you find  
22 have been proved such reasonable inferences that you feel are  
23 justified in light of your common sense and experience, which gets  
24 us to an important concept which because there's some jargon  
09:01AM 25 involved, might be a little off-putting, but it's something you're

1 familiar with.

2 And by that I'm talking about what we call "direct  
3 evidence" and what we call "circumstantial evidence." And you'll  
4 be surprised to know perhaps by the time I finish, I hope you'll  
09:01AM 5 agree, that in your life you consider both types of things,  
6 although I'm sure you don't say now I'm relying on direct  
7 evidence.

8 What do we mean by "direct evidence"? Direct evidence  
9 is where a witness comes in and testifies sort of from her senses  
09:02AM 10 or his senses what he saw, what he heard or what he observed.

11 A bank teller gets robbed. He testifies later that he  
12 saw the robber, the robber had a mask on, the robber spoke certain  
13 words, the robber smelled of alcohol. Those are direct evidence,  
14 sometimes called "sense evidence." I'm sure you'll hear some of  
09:02AM 15 that, that witnesses will come in and testify about what they saw,  
16 heard, observed and so forth.

17 Circumstantial evidence is evidence which tends to prove  
18 a disputed fact by proving other facts. There are lots of  
19 examples that I give. I guess the classic one very *apropos* to  
09:02AM 20 Rochester is the weather example. Let's suppose this morning it  
21 was nice and sunny out when you came in to court and you observed  
22 that. And if I saw you in the hall and I said to you, madam  
23 juror, what's the weather like outside? You could say to me,  
24 well, Judge, I have direct evidence because I just was outside and  
09:03AM 25 I saw the sun shining and it was sunny out.

1                   Well, if you sat here in this room where there are no  
2 windows throughout the morning and you observed folks coming in  
3 the back door carrying umbrellas and with wet raincoats and damp  
4 hair, even though you can't look outside, based on your knowledge  
09:03AM 5 of the raincoats, the umbrellas, the damp hair and your experience  
6 with that in your own life, that would be circumstantial evidence  
7 that if I asked you now what the weather was like outside, you  
8 would say based on all those factors, Judge, I believe it's  
9 raining outside.

09:03AM 10                   We can talk about a lot of different examples, there are  
11 many. I guess the famous one in literature was sort of the  
12 *Robinson Crusoe* story. You go down to the beach in the morning  
13 and you see footprints. Even though you didn't see the person  
14 walking, you would be able, based on your knowledge and  
09:04AM 15 experience, to say based on the existence of the footprints, I  
16 believe there was a person here.

17                   If you come into the kitchen and you see your grandchild  
18 with his hands behind his back and little crumbs on his face and  
19 the cookie jar open, you might, based on those facts, conclude  
09:04AM 20 that he had borrowed or stolen a cookie .

21                   You infer on the basis of reason and experience and  
22 common sense from some established fact the existence or  
23 non-existence of other facts. Circumstantial evidence is of no  
24 less value than direct evidence. The law makes no distinction  
09:04AM 25 about it. A party can rely completely on circumstantial evidence

1 in establishing matters in issue.

2 You must weigh all the evidence, regardless by what name  
3 we call it, in deciding the factual issues in this case.

4 Oftentimes in deciding an individual's state of mind, one has to  
09:05AM 5 rely on circumstantial evidence. So keep that in mind as well as  
6 we proceed through the case.

7 I mentioned a little bit about credibility of witnesses  
8 yesterday. I tell you again that it's your job to weigh the  
9 testimony of all the witnesses and decide what weight to give that  
09:05AM 10 testimony. In sum, you can accept every single thing a witness  
11 says, some of it, or none of it. It's up to you.

12 There won't be any quiz at the end of the day as to how  
13 much testimony you believe -- certainly there would never be that,  
14 but you have to consider every witness. Consider the witness'  
09:06AM 15 intelligence, motive for testifying, state of mind, whether the  
16 witness really has a good recollection of what occurred many years  
17 ago.

18 You may consider how the witness acts and performs on  
19 the witness stand. You should consider whether the witness  
09:06AM 20 impresses you as someone who is telling the truth or someone who  
21 is not telling the truth. Consider the relation or the  
22 relationship that a witness bears to either side in the case that  
23 may effect how the witness testifies.

24 You should consider the extent to which, if at all, the  
09:06AM 25 witness might be affected by your verdict. You should consider

1 whether the witness has been supported by other witnesses and  
2 evidence or contradicted.

3                   Inconsistencies or discrepancies in testimony between a  
4 particular witness or other witnesses may cause you to discredit  
09:07AM 5 that testimony, but I also remind you that two or more persons  
6 witnessing an incident or event may see or hear it differently.

7 It's not unusual. It may simply be an innocent misrecollection or  
8 a failure to recollect, and that's not uncommon. If you find any  
9 discrepancies or inconsistencies, you should first consider is it  
09:07AM 10 a matter of some importance or some unimportant detail? Does it  
11 result from innocent error and mistake or intentional falsehood  
12 designed to mislead you? All of these things are things you  
13 should consider in deciding the important issues that are  
14 presented to you.

09:08AM 15                   If Mr. Chambery proves his case by a preponderance of  
16 the evidence, then he is entitled to a sum of money that will  
17 fairly and justly compensate him for the losses and injuries  
18 caused by the conduct of the defendants.

19                   Because the way we have structured this trial, I will  
09:08AM 20 not instruct you further on that at this point because we are  
21 going to try what's called the "liability" part of the case first  
22 to determine if Mr. Chambery has proven his case by a  
23 preponderance of the evidence.

24                   If your verdict is that he has proven that, then we may  
09:08AM 25 take a break and we will proceed to some proceedings concerning

1 just damages, and then at that time I will instruct you more fully  
2 on the law of damages. But I think at this point I will hold that  
3 until we get to that stage of the case.

4 So, again, these are preliminary instructions. I am  
09:09AM 5 sure at the end of the case my instructions may be a little more  
6 expansive depending on issues that have come up, matters that are  
7 raised by the lawyers, et cetera, but I think for now that's all I  
8 intend to say.

9 Yesterday before you left I talked to you about several  
09:09AM 10 things: Keeping an open mind, not discussing the case, not having  
11 any contact with the parties, not doing any investigation,  
12 et cetera. That's sort of -- I may repeat that in full, but I  
13 also may just say to you "remember my admonition." It's just a  
14 shorthand way of saying remember all the stuff I told you on the  
09:10AM 15 first day.

16 Let me say one word about notes and then we will take a  
17 break and let the parties get ready for their opening statements.  
18 In the past some judges would not let or they would at least frown  
19 on jurors taking notes. I don't happen to agree with that and I  
09:10AM 20 let jurors take notes if they want to.

21 There's no requirement to take notes. They're your  
22 notes, they're not going to be collected or graded. We're going to  
23 have several days of testimony and it might be helpful for you  
24 just to try to keep track, especially because of what I said about  
09:10AM 25 this being really a lawsuit against seven different people. It's

1 going to be important for you at the end of the day to make  
2 judgments as to whether the plaintiff has proven his case against  
3 each of the seven. That may be a reason why you want to take  
4 notes.

09:11AM 5                   A couple of cautions about note taking. If a witness  
6 gets on the stand and says A, B and C, if you're so busy writing A  
7 down and you don't hear B and C, that's unfortunate. I think  
8 there's enough pauses between proceedings that you can still jot  
9 notes. But keep that in mind.

09:11AM 10                  Also, you know, some people don't really need notes;  
11 they have pretty good recollection. Other people find some notes  
12 helpful. If you get in the jury room, remember that some people  
13 are better note takers than others. Just because your fellow  
14 juror says I have a note here that said this witness said the moon  
09:11AM 15 is made of blue cheese -- well, if your recollection is different,  
16 don't be swayed necessarily because another juror claims to have  
17 written something down.

18                   So we'll talk more about note taking. If you take  
19 notes, they're your own notes. You're not supposed to talk about  
09:12AM 20 the case among yourselves anyway, so you can't share your notes.  
21 We leave the notebooks in the jury room overnight where they're  
22 secure. And they are designed to be of assistance to you, not a  
23 burden.

24                   So I think we will take a little break to let the  
09:12AM 25 lawyers set up. They have some visual aids I think that are going

1 to assist them and hopefully you in their opening statements. So  
2 we'll excuse the jury at this time. You can walk through that  
3 door. I think Ms. Rand is probably awaiting on the other side for  
4 you, and we'll call you back in a few minutes.

09:12AM 5 (WHEREUPON, the jury was excused).

6 THE COURT: All right, take a few minutes to get lined  
7 up.

8 MR. COOMAN: Judge, mindful of the discussion that we had  
9 the other day, there is a very good breaking point about 45  
09:13AM 10 minutes or so into it. And if I may turn to you at that point and  
11 say perhaps this is a good time to take a break? I think that  
12 would assist everyone.

13 THE COURT: I'm distressed about David.

14 MR. LEVINE: Yes, I'm concerned also.

09:13AM 15 THE COURT: That's too bad. Well, we have a juror issue,  
16 but why don't we go do what we have to do and I won't trouble you  
17 with that at this point.

18 MR. LEVINE: I have one comment in your preliminary  
19 charge --

09:13AM 20 THE COURT: Yes.

21 MR. LEVINE: -- when you were talking about motivating  
22 factor, you gave what I thought was the law, but then you talked  
23 about if it played some part or influences. And I think that  
24 watered down that it has to be a motivating factor or substantial  
09:14AM 25 aspect of it.

1                   And I know this is preliminary, but I would just ask you  
2 to think about my comments with regards to your final charge to  
3 the jury because I think what you said the first part was exactly  
4 as I recall the law, and I think what you gave after that watered  
09:14AM 5 it down some. They're meant to be really synonyms for what I  
6 think is a substantial motivating --

7                   THE COURT: What?

8                   MR. LEVINE: You said it played some part or it  
9 influenced, and I think that turns away from what I read the law  
09:14AM 10 as. I'd ask you to consider that.

11                  THE COURT: Will do.

12                  MR. LEVINE: Thank you, Judge.

13                  THE COURT: All right, let us know when you're ready.  
14                  (WHEREUPON, there was a pause in the proceeding.)

09:30AM 15                  THE COURT: We have several easels set up, presumably to  
16 assist Mr. Cooman. Mr. Levine, have you reviewed them and --

17                  MR. LEVINE: They're literally blank calendars and a  
18 breakdown of some key terms.

19                  THE COURT: All right. Can I look at them?

09:30AM 20                  MR. COOMAN: Yes.

21                  MR. LEVINE: This is the terms. The other ones are  
22 just --

23                  THE CLERK: Blank calendars.

24                  MR. COOMAN: Calendars. I put some sticky notes on key  
09:30AM 25 events.

1                   THE COURT: So no objection, Mr. Levine?

2                   MR. LEVINE: No, sir.

3                   THE COURT: Okay. Obviously you're not going to be able  
4 to see, but you can hear.

09:31AM 5                   All right, bring in our jurors. I may say something to  
6 the jury not to explain completely Mr. Rothenberg's absence, but  
7 just that multiple lawyers, they come and go; the parties don't  
8 always have to be here, they come and go, all of which is true.

9                   (WHEREUPON, the jury is present).

09:32AM 10                  THE COURT: All right, ladies and gentlemen, as I said to  
11 you a couple times, the next part of the trial consists of the  
12 opening statements of the lawyers. The plaintiff must go first;  
13 the plaintiff in the case gets to open to you, and at the end of  
14 the case the plaintiff gets the last word and, therefore, closes  
09:33AM 15 last.

16                  Mr. Cooman has some visual aids that are going to assist  
17 him and you as well. I thought I would just mention that  
18 Mr. Rothenberg is not here this morning. In cases like this where  
19 there are multiple lawyers and multiple parties, people come and  
09:33AM 20 go and perform various tasks at various times. It's not necessary  
21 that all the parties be here all the time.

22                  So it's not for any lack of interest on the part of  
23 Mr. Rothenberg. It's just cases like this involve different tacks  
24 and people come and go. You're not to be surprised by it.

09:33AM 25                  So, Mr. Cooman, if you're ready to make your opening

1 statement to the jury, you may proceed.

2 MR. COOMAN: Thank you, Your Honor.

3 May it please the Court, ladies and gentlemen of the  
4 jury, this case is about the frightening outcome for us as  
09:34AM 5 citizens when state government runs amuck.

6 It's a case about what happened when government  
7 regulators, instead of trying to protect and listen to local  
8 businesses and assist in their growth and innovation development,  
9 instead decided to misuse and abuse their power for their own  
09:34AM 10 agenda.

11 We're here today because in 1999, New York State  
12 Department of Health regulators deliberately set out to retaliate  
13 against a pioneering healthcare professional and a preeminent  
14 nursing home and they tried to justify their misconduct under the  
09:34AM 15 guise of concern for the residents at that nursing home.

16 In this case the plaintiffs are now asking you to hold  
17 those seven Department of Health officials who are seated at the  
18 table over here accountable for their misconduct and for the harm  
19 that they caused.

09:35AM 20 We want you to hold those seven people, those seven  
21 governmental regulators accountable for their abuse of the trust  
22 that we, as citizens, place in them as public servants to do the  
23 job that they're supposed to do and that they're paid to do.

24 The evidence that you're going to hear and to read about  
09:35AM 25 during this trial is going to demonstrate to you two things.

1 Number one, why the defendants decided to do what they did, they  
2 put down Beechwood Restorative Care Center and destroyed the  
3 Chamberys' business and reputation. And, number two, how they  
4 managed to accomplish that all in record time.

09:35AM 5 I would like to first take a couple of minutes to  
6 summarize for you and then I will go ahead and outline in more  
7 detail the evidence, the proof that you're going to hear unfold  
8 over the next few weeks.

9 For 45 years, from 1955 through 1999, two generations of  
09:35AM 10 the Chambery family had established and developed Beechwood  
11 Restorative Care Center as a nursing home that was renown for its  
12 excellent care of residents. There was a clear history of high  
13 quality care. This was reflected in repeated inspections by the  
14 Department of Health that were deficiency free.

09:36AM 15 I'll refer throughout this trial to the Department of  
16 Health as "DOH." I'm shortening it.

17 There was also secondly a culture within Beechwood and  
18 among the staff of both concern for the residents and of  
19 continuous improvement that mandated there be prompt correction of  
09:36AM 20 any care issues or complaints that came about.

21 And, thirdly, there was objective statistical quality of  
22 care measurements that placed Beechwood consistently among the  
23 very top facilities in the state.

24 By the mid-1990s, under Brook Chambery's leadership,  
09:37AM 25 Beechwood was at the forefront of the movement for quality care in

1 nursing homes; he was on the cutting edge of innovation for  
2 short-term rehabilitation programs; and he was the recognized  
3 leader in the technological revolution going on in electronic  
4 medical records for nursing homes.

09:37AM 5 At the Department of Health in Albany, Laura Leeds --  
6 one of the defendants in this case -- was the official in charge  
7 of overseeing and regulating all of the nursing homes across  
8 New York State. Her area of responsibility you will hear is  
9 referred to as "continuing care" or "long-term care." She had  
09:37AM 10 responsibility for about 650 homes from New York City to Buffalo.  
11 Ms. Leeds is a defendant seated at the far right-hand end of the  
12 table here.

13 Sanford "Sandy" Rubin was a regional Department of  
14 Health official. He was head of the Rochester office at DOH, and  
09:38AM 15 he was also the acting head of the entire western region of  
16 New York for the Department of Health. Mr. Rubin is seated at the  
17 table in the middle with the glasses. Mr. Rubin's responsibility  
18 was for about 160 nursing homes across western New York, plus all  
19 the hospitals and all the other regulated healthcare facilities in  
09:38AM 20 western New York.

21 Through a series of instructive letters and corrective  
22 lawsuit s, Brook repeatedly and insistently pushed Rubin and Leeds  
23 to bring their department and the Department of Health into  
24 compliance with the mandates of federal and state law and the  
09:38AM 25 emerging trends in the way care was going to be delivered in

1 nursing homes.

2                   He pressed them to amend outdated regulations, to  
3 recognize the value and the benefits of electronic medical records  
4 instead of old paper charts, and to run the inspections of nursing  
09:39AM 5 facilities properly and to observe the procedures that governed  
6 the way the Department of Health needs to do its very important  
7 job.

8                   But Brook's actions in this regard made worry, work, and  
9 complications for Ms. Leeds and Mr. Rubin. And in response to the  
09:39AM 10 actions that Brook was taking, Ms. Leeds and Mr. Rubin developed a  
11 clearly documented and intense disdain for Brook and for  
12 Beechwood, who they viewed as challenging their authority.

13                   The evidence that you're going to hear over the course  
14 of the case will demonstrate to you that Mr. Rubin and Ms. Leeds  
09:39AM 15 decided to do exactly what the First Amendment of the Constitution  
16 of the United States forbid them from doing: From retaliating  
17 against the Chamberys and Beechwood for questioning state  
18 government, for bringing lawsuits or for writing complaint and  
19 protest letters.

09:39AM 20                   So in 1999 the defendants conducted an unprecedented  
21 retaliatory offensive against Beechwood and Brook. By the way,  
22 that term "offensive" you'll hear me use throughout this  
23 discussion was not a term that we made up. This is a term that we  
24 found in the notes of the defendants referring to their conduct,  
09:40AM 25 "the offensive." It shows they were going on the offensive

1 against Brook and Beechwood.

2 The offensive against Beechwood involved a preplanned  
3 strategy to terminate Beechwood's Medicare and Medicaid funding  
4 from the federal government, and to revoke the Department of  
09:40AM 5 Health's issued operating certificate to the Chamberys that  
6 allowed them to run the facility.

7 Over the course of two months, from mid-April through to  
8 mid-June of 1999, four of the other defendants -- Ms. Sharon  
9 Carlo, Susan Baker, Elizabeth Rich and Cynthia Francis, the other  
09:40AM 10 four women sitting at the table -- at the direction of Ms. Leeds  
11 and Mr. Rubin, conducted a series of inspections at Beechwood.

12 They found, wrote up and trumped up what they alleged to  
13 have been violations of resident care standards. They created and  
14 perpetrated the fix that Brook Chambery was a bad operator and  
09:41AM 15 that Beechwood had a bad history. They also created the fix and  
16 repeated it over and over again. You'll see in the e-mails that  
17 Beechwood and Brook would not and did not correct the  
18 deficiencies.

19 Then the defendants arranged for the termination of the  
09:41AM 20 Medicare and Medicaid funding to the facility, and they advised  
21 Beechwood's private pay residents that they should leave. They  
22 did that by a specific letter and by a public relations campaign  
23 conducted in the media.

24 The defendants then arranged and conducted a hearing not  
09:41AM 25 in a court, but in an in-house administrative proceeding and they

1 issued a report sharply critical of the Chamberys' operation in  
2 Beechwood.

3                   And, finally, the defendants' action culminated in a  
4 singular, never before occurring event: The Chamberys' state  
09:42AM 5 operating license to run their nursing home was revoked.

6                   The results were devastating. Elderly residents who  
7 counted Beechwood as their home, those families did not want them  
8 to move, had to move out and find other places to live. 113  
9 dedicated long-term care employees lost their jobs and had to go  
09:42AM 10 find and seek other employment, sometimes in other lines of work  
11 completely.

12                  Defendant Russell Altone, the gentleman seated in the  
13 middle right here beside Ms. Leeds, was in Albany. Mr. Altone was  
14 a member of the Division of Legal Affairs in the Albany office of  
09:42AM 15 the Department of Health. He refused to allow the Chamberys to  
16 sell the nursing home business to anyone else as they were on the  
17 way out.

18                  So the family business and reputation were ruined, and  
19 the career and reputation of Brook Chambery was destroyed. And  
09:43AM 20 that, in summary, is why we're here today finally, 13 years after  
21 the events in question: To obtain justice, and to hold these  
22 defendants accountable for their actions.

23                  And I want to tell you in some detail about the specific  
24 evidence that you're going to hear and read about over the next  
09:43AM 25 several weeks. Now, this evidence is going to come to you not

1 just from the Chamberys, but also from former employees of  
2 Beechwood and others who had an in-depth knowledge of Beechwood  
3 and the reality of the care that was being given at the facility  
4 week in and week out, month after month, year after year.

09:43AM 5 You will also hear a great deal about from the  
6 defendants themselves because each of them left a trail of e-mails  
7 and notes that reveal their true motives and intent with respect  
8 to what they were doing. Those documents confirm why the  
9 defendants singled out Beechwood for this kind of treatment and  
09:44AM 10 Brook, and they had decided what they would dish out to him which  
11 was different from what had happened to anybody else before or  
12 since.

13 The Beechwood Restorative Care Center was located at  
14 900 Culver Road in the City of Rochester. Brook's father and  
09:44AM 15 mother, Herbert and Olive Chambery, had established Beechwood in  
16 1955 as a family owned and operated nursing home. Beechwood was  
17 not a large and impersonal institution.

18 The vision and the mission of the Chambery family from  
19 day one was to provide excellent elder care, but in a personalized  
09:44AM 20 home like environment and treating the residents that were there  
21 as their own family members.

22 There were several key indicators of quality care at  
23 Beechwood. Number one, it was a facility of choice for consumers.  
24 People were not forced to go to Beechwood; they decided to go to  
09:45AM 25 Beechwood. If you had a family member who needed to go into a

1 nursing home for rehabilitation after surgery or an injury, or for  
2 a longer term end of life type of stay, Beechwood was high on the  
3 list of places that you wanted to have them go.

4                   Secondly, Beechwood was known for speedy rehabilitation  
09:45AM 5 and return to home for its residents who were able to do so with  
6 confidence and preparedness when they had completed their  
7 rehabilitation.

8                   Thirdly, there was tremendous community recognition of  
9 Beechwood's standing. Knowledgeable people in the healthcare  
09:45AM 10 community who supervised care and knew and recognized Beechwood to  
11 be one of the very best in the region.

12                   And, fourth, they employed cutting edge technology at  
13 Beechwood. They pioneered the creation and the implementation of  
14 computerized electronic medical records that were networked across  
09:46AM 15 the facility in the 1990s when the hospitals in town and most of  
16 the other local facilities were still writing by hand in paper  
17 charts.

18                   Herbert and Olive Chambery jointly owned and operated  
19 Beechwood for a period of 37 years. It was their life, it was  
09:46AM 20 their passion. And when Brook's father Herbert died in 1993,  
21 Brook took over the day-to-day operation, direction of the home in  
22 partnership with his mother Olive.

23                   Brook had grown up knowing the business over the kitchen  
24 table, and I mean that literally. Brook from childhood had  
09:46AM 25 watched and learned how a nursing home was to be run. When his

1 parents had opened the nursing home in the 1950s on Culver Road,  
2 it was actually in their own home back at that time. That's the  
3 way nursing homes were established and operated.

4                   And in the facility the Chamberys themselves lived with  
09:47AM 5 the residents. So Brook observed and internalized all of these  
6 values that his parents had with respect to how you cared for and  
7 concern for elderly people, vulnerable people.

8                   So after he obtained his college degree in 1972, Brook  
9 came back home, he obtained a nursing home license,  
09:47AM 10 administrator's license and he joined his father in building and  
11 opening in 1974 the new and expanded Beechwood facility, a three  
12 story facility, on Culver Road. And that new facility was able to  
13 accommodate 82 residents.

14                   Brook also continued his studies, he went to the  
09:47AM 15 University of Rochester and obtained a master's in business  
16 administration, MBA, in 1976.

17                   Brook then spent a considerable portion of the next 20  
18 years learning and immersing himself in every aspect of the  
19 nursing home business. He learned all the things about staffing,  
09:48AM 20 about care delivery, about food service, finances, facility's  
21 management, maintenance and compliance with the Department of  
22 Health and federal regulations which govern how it was that a  
23 nursing home had to operate.

24                   The Beechwood staff members who will be here to testify  
09:48AM 25 will tell you that Brook was an inspirational leader. He was the

1 best boss that they had ever had before or since because he was  
2 intent on leading them through this exciting evolution in nursing  
3 home care to meet the changes that were occurring in the  
4 healthcare delivery system and the patients' demands and needs as  
09:48AM 5 they became consumers of healthcare services.

6 He set out to build upon, expand upon what his parents  
7 had already created because Brook understood in a way that few  
8 others did back in the late 1990s that nursing homes had to change  
9 the way they were delivering care.

09:49AM 10 He envisioned improving quality of care and life for the  
11 traditional long-term residents, making even the declining end  
12 years of somebody's life as meaningful and comfortable as they  
13 could possibly be.

14 In addition, Brook understood that nursing homes were no  
09:49AM 15 longer going to be solely viewed as a place for end of life care  
16 where you simply went and stayed and then endured until the end,  
17 but they were becoming -- to the extent possible -- places for  
18 rehabilitation, places that you moved through on the way to a more  
19 independent living and assisted living facility or being able to  
09:49AM 20 go back home.

21 How is it that Brook accomplished this? In tremendous  
22 foresight. You're going to hear that he understood that truly  
23 excellent healthcare required coordination among all the different  
24 disciplines, all the different kind of caregivers that are within  
09:50AM 25 a nursing home.

1                   And he understood this was going to be best made  
2 possible through the use of technology. You don't replace the  
3 caring people, you can't do that. But you put in their hands  
4 tools that they've never had before.

09:50AM 5                   So Brook and his brother Dale created from scratch a  
6 comprehensive electronic medical records system, what we refer to  
7 by shorthand as an EMR, electronic medical record, from scratch  
8 for use in the nursing home environment. And he installed and  
9 implemented it at Beechwood as the flagship site. He developed  
09:50AM 10 this software in a companion business to the nursing home; and  
11 appropriately enough, it was named Beechwood Software.

12                   The EMR software was the first system approved in the  
13 United States by the federal government for use in reporting  
14 patient assessment data from the database that was created with  
09:51AM 15 respect to each of the residents.

16                   Brook became a speaker at national conventions and  
17 seminars. Nursing home administrators from around the country  
18 came to Beechwood to see how this was implemented and to see  
19 Beechwood in action.

09:51AM 20                   I think you can appreciate that there are many  
21 advantages to implementing a network EMR across a nursing home.  
22 Two of them in particular are worth mentioning now. All the notes  
23 and data about the residents are typed and they're readable.  
24 Secondly, all the caregiver disciplines, including the nurses'  
09:51AM 25 aides, have immediate and updated access to the patient's

1 condition and progress. Teamwork is enhanced from the kitchen all  
2 the way to the nurses' stations to the occupational therapy rooms.

3 So this became a critical thing in making sure that  
4 everyone knew the current status and their responsibilities for  
09:51AM 5 caring for the patients.

6 Brook also assembled a highly skilled staff. High  
7 standards were set for the hiring and the retention of only the  
8 very best people. They were very well compensated, and there was  
9 low turnover among the staff.

09:52AM 10 He encouraged those staff to maximize their professional  
11 capabilities and insisted that they have extensive training both  
12 in in-service, within the facility, and outside seminars.

13 At Brook's insistence the staff learned the principles  
14 of continuous improvement: That you had to identify and correct  
09:52AM 15 your inevitable mistakes quickly, and then communicate clearly  
16 with one another and function together as a team for the best  
17 interest of the residents.

18 Beechwood, with those circumstances, became known as the  
19 place to work. And all this was still being done in the context  
09:52AM 20 of what had always been the hallmark of a Chambery run facility,  
21 which is you devote personal care to each of the residents and you  
22 treat them as if they're your own family members.

23 Brook also took some innovative approaches to  
24 rehabilitation to address the fears of the elderly going home.  
09:53AM 25 Those fears are fairly obvious. They think to themselves can I do

1 this? Am I able to go home and successfully do those things that  
2 I thought I used to be able to do before I had this injury or this  
3 illness?

4 And Brook did something that no other nursing home in  
5 town had ever done: He bought the house next door to the nursing  
6 home and he set it up as a place for people to develop as they  
7 were ready to go home from rehabilitation, a place where they  
8 could test out their skills before they ever went home. They  
9 could try stairs in the house, they could try to use the bathroom,  
10 they could see if they could stand up at the sink to do the  
11 dishes, all so that people would go home with confidence in what  
12 had gone on.

Now, the state requires the collection and reporting of quality of care data about facilities across the state so that consumers and nursing homes and even the Department of Health itself can evaluate and make comparisons between nursing homes. And this state data showed that in 1998, there were impressive results for Beechwood as compared to the state's other 650 facilities.

09:54AM 20 We're going to show you as proof during this case  
21 statistics and charts that confirmed steady improving quality of  
22 care for Beechwood throughout the 1990s. Beechwood in those  
23 measures was consistently among the very top facilities of the  
24 state on those measures of quality of care.

09:54AM 25 And Beechwood was economical and efficient at doing the

1 rehabilitation. And in an era of ever escalating healthcare  
2 costs, that's good news for the patients, for the taxpayers and  
3 for the insurers. The statistics show that Beechwood had the  
4 second best Medicare cost per stay rate of the top 25 facilities  
09:55AM 5 in all the state.

6 I need to take a few minutes to give you some  
7 understanding of how nursing homes are actually regulated in  
8 New York because you need to understand how they're supposed to be  
9 regulated in order for you to understand the power that was  
09:55AM 10 available to the defendants and how they were then able to  
11 manipulate and misuse that power to accomplish the result that  
12 they intended.

13 Nursing homes like Beechwood and operators like the  
14 Chamberys play a critical role in the health delivery system  
09:55AM 15 because they stand in the gap between hospitals that provide acute  
16 care and other facilities like assisted living facilities or going  
17 home provide.

18 The nursing home is the only place where you can get  
19 round-the-clock nursing care supervision except in the hospital  
09:55AM 20 setting. So the nurses and aides and administrators that work at  
21 and run a nursing home have responsibility day in and day out, 24  
22 hours a day, seven days a week, all year long for usually aging  
23 and vulnerable people. It is a very, very important  
24 responsibility.

09:56AM 25 Nursing home regulation and oversight in New York is

1 done by the New York State Department of Health. It's done out of  
2 Albany on a statewide basis, and out of the Rochester and Buffalo  
3 regional offices as well.

4 Now, a nursing home is not just an ordinary business  
09:56AM 5 that you can wake up one morning and decide I would like to run a  
6 nursing home because you can't just decide to do that even if you  
7 have the inclination and the resources to do so.

8 Because the State Department of Health holds tremendous  
9 power over that process, the Department of Health is the entity  
09:56AM 10 that determines whether you can start a nursing home, where you  
11 can put it, how many beds it can have in it, what the scope of its  
12 services are, and whether and where and how you can ever expand  
13 it.

14 And the Department of Health does a second thing, it  
09:57AM 15 also issues the operating license for the facility, the license to  
16 actually operate the thing that you own as a business.

17 And the third thing the Department of Health does is  
18 that it periodically inspects nursing homes. The Department of  
19 Health inspector might be in each nursing home five or six times a  
09:57AM 20 year over the course of a whole year's time.

21 How do these inspections work? First of all, let me  
22 give you a term of art. Nursing home inspections are called, in  
23 the parlance of DOH, "surveys." So people that do these things  
24 are called "surveyors."

09:57AM 25 Now, there are two kinds of surveys. One is the

1 unannounced "annual survey." Every nursing home receives a formal  
2 survey once a year. In addition, there are complaint  
3 investigations.

4 Now, these can be on complaints that come in from any  
09:58AM 5 source -- family member, former staff member -- and many of them  
6 are even anonymous complaints that come into the Department of  
7 Health.

8 These occur a lot. That's sort of the nature of the  
9 nursing home business. You're caring for people who are sick,  
09:58AM 10 often in end of life situations and family members in that  
11 situation experience a very wide range of emotions about seeing  
12 their loved ones in that condition or at that stage of life.

13 Defendant Cynthia Francis was at this time in 1999 head  
14 of the Complaint Investigation Unit in Rochester. Ms. Francis is  
09:58AM 15 the woman seated beside counsel at the table here. She estimated  
16 for us that the Department of Health received 800 to 1,000  
17 complaints a year in the Rochester office for the 68 nursing homes  
18 in the Rochester area. If you do the math, that's an average of  
19 about a dozen or 15 per year complaints about average nursing  
09:59AM 20 homes.

21 As I've told you, these survey inspections that are done  
22 are done by people that are called "surveyors." In 1999 Cynthia  
23 Francis and Elizabeth Rich -- Ms. Rich is the woman with the white  
24 hair beside Mr. Altone for this end of the table -- I'm sorry, I  
09:59AM 25 did that wrong. Ms. Rich is in the corner. Ms. Rich and Cynthia

1 Francis were both surveyors. That was their job in the Rochester  
2 office. They were nurses by training, but they did not actually  
3 provide care.

4                   Rather, their job working for the Department of Health  
09:59AM 5 was not to provide care, but to rather go in on these surveys or  
6 in complaint investigations and to look over the shoulders of  
7 nurses who were actually providing the care and the aides that are  
8 actually providing the care.

9                   Here's what a surveyor does: A surveyor goes into the  
10:00AM 10 nursing home and looks for facts. Let me give you a couple of  
11 examples. A resident has a temperature, a resident had  
12 experienced a fall in the nursing home, a resident had a blister,  
13 a resident had developed a pressure sore, a resident had died.  
14 None of those facts would be surprising to find in a nursing home.  
10:00AM 15 In fact, that's exactly what you would expect to find within a  
16 nursing home.

17                   But none of those facts -- although easy to find, the  
18 advantage they have, of course, is that they're objective and  
19 they're verifiable. Then the surveyors' job is to take those  
10:00AM 20 facts and group them into findings and to decide whether what they  
21 have found as a fact amounts to a code violation of something that  
22 the State requires the facility to do.

23                   And if they find that that's true, it's called a  
24 "deficiency." The findings based on the facts are accumulated  
10:01AM 25 into what's called a "deficiency." And if you have a deficiency,

1 the Department of Health surveyor writes that up in a formal  
2 document called a "Statement of Deficiencies." We refer to that  
3 by shorthand as an "SOD," a SOD, a Statement of Deficiencies.

4 In the Statement of Deficiencies, that code violation is  
10:01AM 5 explained in terms of the facts and residents that they feel  
6 justify the violation.

7 Now, findings and deficiencies are highly dependent on  
8 the discretion of the surveyor. It's an entirely subjective  
9 judgment of the surveyor as to what they choose to look at and  
10 choose to find. For example, people often deteriorate in a  
11 nursing home from infirmity of age and progressive disease. The  
12 objective finding is did their condition worsen? Did they  
13 deteriorate? Did they die? The subjective judgment is was there  
14 anything about that event that really reflected a deficiency in  
10:02AM 15 care with respect to that particular person?

16 Now, there's another layer of complexity to this and  
17 subjectivity here because as a surveyor finds these deficiencies,  
18 they must classify those deficiencies in two ways. They are  
19 assigned to a category of care which you'll hear referred to as a  
10:02AM 20 "tag." Tags are numbered with an F in front of them. Let me give  
21 you a couple of examples to crystallize this.

22 If a surveyor goes into a nursing home and thinks that  
23 they have found an issue about the nursing home preventing or  
24 healing pressure sores, blisters with respect to a person for a  
10:03AM 25 particular incident, that finding or deficiency is labeled F314.

1 The number just designates the category of care into which that  
2 particular deficiency is grouped.

3 If the surveyor comes in and believes that there's an  
4 issue about medical records, documentation being inadequate, that  
10:03AM 5 would be labeled as an F514 tag. There are many, many of these  
6 numbers all classified to particular categories of care.

7 And then the final layer of complication, each of those  
8 findings and deficiencies is given a scope and severity grade, a  
9 scope and severity grade. And this grading scale works the  
10:03AM 10 opposite of school. A is the lowest, least serious grade; and L  
11 is the highest, most serious grade. A at the bottom, not a  
12 tremendous concern; L a very significant concern.

13 Now, if there are deficiencies, these deficiencies are  
14 written up into a Statement of Deficiencies and it's sent to the  
10:04AM 15 nursing home so that the nursing home can be on notice of what the  
16 Department of Health is claiming and can respond to what's being  
17 said about it.

18 There are a couple key things to understand. Statements  
19 of Deficiencies, SOD's, are given out to virtually every nursing  
10:04AM 20 home after a survey and often several times a year.

21 Defendant Susan Baker was the Department of Health  
22 program director for nursing homes in western New York. She's  
23 testified that the average number of deficiencies per survey back  
24 in 1998-1999 was six or seven. That's the average number that are  
10:04AM 25 given out in the Statement of Deficiencies.

1                   So you see that a Statement of Deficiency is really a  
2 routine part of the nursing home business. You are told by the  
3 Department of Health that, in their judgment, something is not up  
4 to snuff, you fix it, you improve upon it and you go forward.

10:05AM 5                   A nursing home, under the way the system works, has to  
6 respond to a Statement of Deficiency in two separate ways and must  
7 do so simultaneously. The first -- giving you another acronym --  
8 is IDR. A facility can contest the deficiency in an IDR, which  
9 stands for informal dispute resolution, IDR.

10:05AM 10                  It's a process that may result in the Department of  
11 Health resolving the deficiency because you convinced the  
12 Department of Health that they made an error, that they missed  
13 something in the medical record when they came in and the  
14 Department of Health might choose to rescind the deficiency, wipe  
10:05AM 15 it out; or they might rewrite it in a different way to better  
16 reflect the actual facts of the care; or they might reclassify it  
17 completely. That's the first thing the facility can do is send in  
18 their materials, medical records, other information, for the IDR  
19 process.

10:06AM 20                  The second thing it must do simultaneously is prepare a  
21 Plan of Correction, and it has to be done in the same period of  
22 time and you prepare and you submit it to the Department of Health  
23 for scrutiny and approval. A Plan of Correction you'll hear  
24 throughout the case referred to by another acronym, "POC." Plan  
10:06AM 25 of Correction, POC.

1                   The thing that you can see about this is since you have  
2 to do this simultaneously, the system forces the nursing home to  
3 be both argumentative and corrective at the same time and in the  
4 same document that you have to submit back to the Department of  
10:07AM 5 Health.

6                   Now, all this process is referred to as the "survey  
7 cycle." We've done this chart here for you to sort of help you  
8 understand how this survey cycle works. The condition of a  
9 nursing home with no uncorrected deficiencies is known by the term  
10:07AM 10 of art "substantial compliance." If a nursing home is in  
11 substantial compliance, it means that it has no deficiencies or  
12 it's corrected all the deficiencies that it has. This is the "at  
13 rest state" you might say with respect to a nursing home.

14                  Now, I told you about the fact that annually there is a  
10:07AM 15 survey, and sometimes very often complaint investigations all year  
16 long. The surveyors come in and those surveys and complaint  
17 investigations, two things could happen to it. They might decide  
18 that what they've looked at is unsubstantiated, there's nothing to  
19 it, it doesn't have merit and it would simply go off the chart and  
10:08AM 20 you're in the same substantial compliance that you started with.

21                  Of course, it could be, too, that the surveyors come in  
22 and they say we've looked around, we've looked at medical records  
23 and we believe that there is a deficiency and so we write one or  
24 more of those up into this SOD, the Statement of Deficiencies.

10:08AM 25                  Then within a short period of time, ten days, the

1 facility has to review that Statement of Deficiencies and do two  
2 things: Engage in the IDR process, sending in the materials to  
3 show where the Department of Health may be in error and submit a  
4 Plan of Correction on the assumption that the Department of Health  
10:08AM 5 is right and hears what you would do differently if it turns out  
6 that what they're saying is really true.

7 Once the Plan of Correction has been reviewed and  
8 accepted and put into operation, you return to the state of  
9 substantial compliance and you're sort of back where you started  
10 in the survey cycle.

11 Let me tell you about Beechwood's survey cycle. It had  
12 a very good survey cycle history under Brook's leadership for  
13 three years after Brook assumed leadership of Beechwood. The  
14 Department of Health surveyors alleged no deficiencies at  
10:09AM 15 Beechwood -- zero -- through either complaint investigations or  
16 the annual survey.

17 Now, in the course of Mr. Chambery's pioneering work, he  
18 ran into multiple issues. Brook discovered major flaws in the  
19 regulatory system in the way the Department of Health was carrying  
10:09AM 20 out its responsibilities in this emerging new era. I want to  
21 discuss two of them now, although during the testimony you're  
22 going to hear of several others.

23 The first big issue he ran into was with respect to  
24 discharge planning for residents. The federal rules require that  
10:10AM 25 nursing homes bring residents to their highest possible level of

1 functioning and, when possible and as soon as possible, put them  
2 in a situation where they could be discharged from the nursing  
3 home to a more independent level of care, whatever level they were  
4 capable of handling: Assisted living or going home.

10:10AM 5 Of course, that makes sense because government taxpayers  
6 or insurance companies are often paying the bills in the nursing  
7 home and you want to be able to move the patient to the most  
8 independent level in setting that is possible for them to handle.

9 And just as the hospitals over time have shortened their  
10 stays for inpatient admissions, so too this is what nursing homes  
11 needed to do. This is what the federal law required. It required  
12 that when there was a dispute about whether a resident was indeed  
13 ready and able to leave the facility and go home or go to another  
14 independent living sort of situation, the issue about how that  
15 would be decided was to occur in an independent hearing. But  
16 Ms. Leeds and Mr. Rubin didn't like that federal law or want to  
17 implement it in New York State.

18 Secondly, with the advent of electronic medical records  
19 at Beechwood, the Department of Health surveyors in Rochester,  
20 like Ms. Rich and Ms. Francis, periodically -- in fact, quite  
21 frequently -- did their surveys at Beechwood poorly and often  
22 inaccurately.

23 Brook and Beechwood, who by the nature of their use of  
24 the computers were detail oriented, repeatedly found mistakes in  
25 the few deficiencies that were alleged at Beechwood in 1996 and

1 1997. Beechwood found that the surveyors overlooked things in the  
2 electronic medical records; that things were left out of the  
3 Statements of Deficiency so that there wasn't a complete clinical  
4 picture given with respect to a resident.

10:12AM 5 That's understandable in computer medical records that  
6 were cutting edge, they were new, they were efficient. And  
7 surveyors like Ms. Rich and Ms. Francis, who had never used  
8 electronic records many years before when they had been actual  
9 practicing nurses in the field and not inspectors, had difficulty  
10 understanding and accepting them.

11 Beechwood was sensitive to that concern and understood  
12 from its own process of implementing it in the nursing home there  
13 was a learning curve to learning some new technology like that, so  
14 they went out of their way to try to have the Department of Health  
15 understand it.

16 Brook and Beechwood ran seminars at the facility for the  
17 Department of Health surveyors to show them how these records  
18 worked. These seminars that were held included Ms. Rich and  
19 Ms. Francis. Beechwood did this several times; they tried to  
20 teach the surveyors how to use this new technology.

21 But it didn't seem to take. The surveyors repeatedly  
22 overlooked things in the medical records or misunderstood the way  
23 the care was being delivered at Beechwood and they wrote up  
24 improper deficiencies.

10:13AM 25 This prompted Brook and the staff members to use the IDR

1 system that we've talked about in 1996 and 1997 in order to  
2 resolve the errors that the DOH had made in those SOD's. This, as  
3 you can probably imagine, gave rise to an increasing tension in  
4 the relationship between the surveyors and Beechwood, and  
10:13AM 5 particularly between Mr. Rubin and Beechwood.

6 So Brook turned to letter writing and a lawsuit in order  
7 to try to get the Department of Health to address these two major  
8 issues that I've just told you about. Brook used the courts when  
9 it was finally necessary as a last resort to force the Department  
10 of Health to correct regulatory problems or faulty procedures that  
11 impacted his ability at Beechwood to deliver adequate care to the  
12 residents.

13 At the end of 1996, Brook commenced what you will hear  
14 described as the "Langeveld lawsuit." Beechwood had a long-term  
10:14AM 15 care resident by the name of Edith Langeveld who had actually come  
16 in as a long-term care resident, but had been successfully  
17 rehabilitated such that she was ready to be discharged to a more  
18 independent level of care in the judgment of her physician.

19 Mr. Rubin didn't want to follow the rules which required  
20 the Department of Health to hold an independent hearing about was  
21 she ready to go home or go to assisted living or not.

22 Mr. Rubin, you will hear, had no medical training at  
23 all, wanted to do this procedure simply by coming in to the  
24 nursing home, looking around himself and making a decision about  
10:14AM 25 whether Mrs. Langeveld was medically ready to move or not, all

1 without a hearing that was required by federal law.

2 So Beechwood, as a last resort, named Mr. Rubin  
3 personally in a lawsuit to stop the illegal procedure that  
4 Mr. Rubin was employing. What was the outcome of the lawsuit?

10:15AM 5 Mr. Rubin and the Department of Health was forced to concede that  
6 they were wrong. The Court ordered the Department of Health to  
7 change the state regulations and procedures to comply with the  
8 federal regulations to hold an independent hearing to make that  
9 judgment about resident discharge.

10:15AM 10 So Brook's willingness to use the courts if need be to  
11 make the Department of Health responsive whenever necessary was  
12 clear. The Department of Health, and as you will see their  
13 e-mails reveal, was feared by Leeds and by Rubin.

14 Brook also found it necessary to write letters, a lot of  
15 them over two or three years from 1996 through 1998, he sent  
16 letter after letter to Albany higher and higher up the chain of  
17 command, ultimately to what was known as the Office of Regulatory  
18 Reform in Albany and to the Governor's office. Mr. Chambery in  
19 these letters pointed out precisely the flaws in the system and he  
20 demanded correction and change.

21 These multiple repeated letters wind up on Ms. Leeds',  
22 Laura Leeds', desk to deal with. And during the trial you're  
23 going to have the opportunity to see a number of these.

24 Let me give you one example. In May of 1997 Brook sent  
25 a detailed letter to the Commissioner of Health carefully

1 outlining what the Department of Health needed to do with its  
2 regulations in order to fix the Langeveld problem, the thing that  
3 had given rise to the Langeveld lawsuit.

4 Brook's letter, you will see, were not whining in  
10:16AM 5 protest about something. These were constructive. These often  
6 included elaborate citations to the law and to the regulations,  
7 laying out the problems and constructively offering solutions as  
8 to how it should be fixed to move forward in a better way.

9 And he warned the Department of Health that if they  
10:17AM 10 didn't do this and bring their regulations into compliance with  
11 federal law, they were in danger of losing New York's federal  
12 financial funding to the state with respect to these procedures.

13 Now, it was Ms. Leeds' job, because she was the head of  
14 the Office of Continuing Care, to respond to that letter from  
10:17AM 15 Brook as well as the many others that he sent.

16 And two months later, after he sent the May letter, in  
17 August of 1997 Ms. Leeds got the task -- and you will see the  
18 embarrassment of writing to all the other nursing homes in the  
19 state explaining that the Department of Health had lost the  
10:17AM 20 Langeveld lawsuit and that the Department of Health was going to  
21 have to change the way it was handling resident discharge disputes  
22 in order to comply with the federal law mandates.

23 In 1997 and 1998 the Department of Health surveys at  
24 Beechwood resulted in a few deficiencies. Beechwood utilized the  
10:18AM 25 IDR process to discuss and try to resolve these. Several were

1 rescinded by the Department as invalid and improper; they  
2 recognized they didn't have it right when they made the  
3 allegations.

4                   But increasingly you will see that Mr. Rubin dug in his  
10:18AM 5 heels and refused to listen to what Beechwood or the medical  
6 professionals who cared for the residents at Beechwood had to say  
7 in the IDR submissions that were made.

8                   Brook, tired of butting heads with Mr. Rubin, he decided  
9 to go over the head of the Department of Health to the federal  
10:18AM 10 government in order to try to get Mr. Rubin's western New York  
11 surveyors to do their job properly.

12                   The state is, in turn, regulated by a federal government  
13 agency called the Healthcare Financing Administration. Another  
14 acronym, "HCFA." HCFA for short. HCFA was responsible for  
10:19AM 15 overseeing the proper administration and performance of the  
16 surveys by the Department of Health personnel.

17                   So Brook made a series of calls to the HCFA Region II  
18 supervisors in New York City, and in January of 1999 Brook sent a  
19 letter to HCFA protesting surveyor performance in western New York  
10:19AM 20 and asking for a full investigation of the survey process that had  
21 taken place at Beechwood over the last couple of years.

22                   Now, you're going to see from the e-mail trail that will  
23 be shown to you that the Department of Health personnel viewed  
24 anything other than a very submissive response to an SOD as a  
10:19AM 25 challenge to their authority and, hence, a serious threat.

1                   Mr. Rubin, who was head of the Rochester office,  
2 developed a clearly articulated resentment and anger against  
3 Beechwood and against Brook in particular. Rubin had been named,  
4 as I told you, personally in that Langeveld lawsuit and his  
10:20AM 5 e-mails revealed that he hated it.

6                   In addition to the embarrassment of losing that case, he  
7 looked to his Albany superiors as if he couldn't get control of  
8 the nursing home operator in Rochester who was bombarding Albany  
9 with letters.

10:20AM 10                   Rubin also hated the fact that Brook utilized the IDR  
11 process provided by law to contest the deficiencies that the  
12 Department was alleging. You will hear that in Mr. Rubin's view,  
13 Brook and Beechwood were simply supposed to take their lumps, just  
14 decide to acquiesce to whatever the Department of Health said to  
10:20AM 15 them.

16                   It was an IDR session led by Mr. Rubin on April 7th,  
17 1998, over a Beechwood deficiency that the Department of Health  
18 had alleged, in that session Mr. Chambery brought documents,  
19 statements from the physicians for the resident involved saying  
10:21AM 20 that there were no issues of care with respect to the resident.

21                   Mr. Rubin refused to budge on the deficiency despite the  
22 clear physician statements refuting the legitimacy of them.  
23 Mr. Chambery was very frustrated with the way Mr. Rubin had  
24 conducted himself, but it was Mr. Rubin who also walked out of  
10:21AM 25 that meeting, as you will hear one of his surveyors testify,

1 walked down the stairs gloating to his staff about how he had  
2 bested Brook in the IDR session.

3                   Most significantly, though, Mr. Rubin went to his  
4 computer and he banged out an e-mail to Ms. Leeds in Albany.

10:22AM 5 You'll have a chance to read that e-mail, because that e-mail  
6 reveals and confirms several things about Mr. Rubin's attitudes  
7 and approach and what he had in store for Beechwood and Brook.

8                   First of all, he told Ms. Leeds that he was writing to  
9 her about, quote, the notorious Brook Chambery. Number two,  
10 Mr. Rubin out of the blue in this e-mail, three years  
11 after-the-fact, brought up the Langeveld lawsuit and Brook's use  
12 of the IDR process and protest to HCFA, and he labeled these and  
13 characterized them as improper challenges to our authority.

14                   And Mr. Rubin in this e-mail began to perpetrate to  
15 Ms. Leeds what would become his cover story, saying that he had  
16 concerns about the quality of care at Beechwood.

17                   You will see that this, of course, was the perfect cover  
18 for Mr. Rubin because he knew no one would question him if he said  
19 there are care concerns at this facility. Mr. Rubin also told  
20 Ms. Leeds he wanted something done about Brook, that he wanted to  
21 stop what he labeled as Brook's unacceptable behavior.

22                   He used the words "cease and desist." I want  
23 Mr. Chambery to cease and desist. From what? From his  
24 constitutionally First Amendment protected right that guaranteed  
25 the right the judge told you about to petition state government

1 for the redress of grievances for the improvement of systems being  
2 regulated by the State.

3                   But Mr. Rubin said I need a remedy, I need something to  
4 be done to stop Brook. The developments at the end of 1998 and  
10:23AM 5 the first part of 1999 set the stage for what was to become the  
6 1999 offensive.

7                   Ms. Baker had become the long-term care program director  
8 in western New York in the spring of 1998. And although she was  
9 certified as a surveyor, she was a dietician by training and was  
10 10:24AM not a nurse. But she was now made supervisor of all the surveyors  
11 doing all the nursing home inspection work in western New York.

12                   Ms. Baker's boss was Sharon Carlo, the person I  
13 mistakenly pointed out to you before as -- Ms. Carlo is the woman  
14 with the glasses here in the center. Ms. Carlo was Ms. Baker's  
15 10:24AM boss.

16                   She was newly hired at the Department of Health in  
17 November of 1998, and she was hired to oversee continuing care in  
18 western New York. She was a nurse and a licensed nursing home  
19 administrator. She and Ms. Baker operated primarily out of the  
20 10:24AM Buffalo office, coming to Rochester perhaps a day or two a week.

21                   And, finally, Ms. Carlo's boss was Sandy Rubin. Sandy  
22 Rubin was head of the Rochester office. But in November of 1998,  
23 Mr. Rubin was elevated to the area administrator for all of  
24 western New York with responsibility for the Buffalo and Rochester  
25 10:25AM regions.

1                   Beechwood had its annual survey in the late fall of  
2 1998. The Department of Health alleged several deficiencies  
3 against Beechwood in that survey. Beechwood contested the  
4 deficiencies with an IDR written submission and an in-person  
10:25AM 5 conference.

6                   The Department of Health wound up rescinding one of  
7 those deficiencies, but you also will see the evidence that will  
8 be presented to you that the memos and e-mails surrounding that  
9 survey before and after reveal that the defendants, Ms. Baker and  
10 10:25AM Ms. Carlo, had been brought into the anti-Chambery camp by  
11 Mr. Rubin.

12                  Beechwood submitted a Plan of Correction, which the  
13 Department of Health ultimately accepted after some calls that  
14 Brook made to HCFA in New York City. Another survey cycle had  
15 been completed at the end of December.

16                  Beechwood had, once again, shown its ability to do the  
17 two things it was permitted to do, which was contest the things  
18 that were alleged by way of an IDR submission; or at the same time  
19 to be able to submit a Plan of Correction.

20 10:26AM          And on January 11th, 1999, as we begin 1999, the  
21 Department of Health in a letter signed by Ms. Baker, pronounced  
22 Beechwood to be in substantial compliance.

23                  Your Honor, I think this is a good moment for a break if  
24 we may?

25 10:26AM          THE COURT: All right, ladies and gentlemen, Mr. Cooman

1 has more, but I think we've gone on for almost an hour, so why  
2 don't we let you stretch your legs and take our morning -- one of  
3 our morning breaks? The jury can step outside.

4 (WHEREUPON, there was a pause in the proceeding.)

10:45AM 5 (WHEREUPON, the jury is present).

6 THE COURT: All right, Mr. Cooman, you may continue and  
7 conclude your statement.

8 MR. COOMAN: Thank you, Your Honor.

9 The amazing story of what happened at Beechwood over a  
10 period of less than 60 days from mid-April through mid-June of  
11 1999 is probably best told to you so that you can understand it  
12 from two perspectives: What appeared to be happening from  
13 Beechwood's perspective and what was actually taking place.

14 From where Beechwood sat, it appeared on the surface of  
15 things here was the chronology of events: At the end of March  
16 surveyor Liz Rich came to Beechwood on a routine complaint  
17 investigation about a former resident, a man by the name of David  
18 Moore, who had lived at Beechwood for several months in 1998 and  
19 again in early 1999 in between his multiple hospital stays and  
20 prior to his passing away at the hospital.

21 Ms. Rich's investigation of the Moore complaint was  
22 concluded in early April and it was closed as an unsubstantiated  
23 complaint. As I described to you before, it can be substantiated  
24 or unsubstantiated. It was determined to be unsubstantiated.

25 If the complaint is determined to be without merit, it

1 would be so marked in the official Department of Health records,  
2 and it was in this case.

3                   On April 15th Ms. Rich came back to Beechwood again.  
4 This time she came in tandem with her supervisor Ms. Francis, who  
10:46AM 5 at that time was head of the Complaint Investigation Unit.  
6 Supposedly they were back to investigate another complaint that  
7 had come in in the meantime about a former resident's lost  
8 property.

9                   Ms. Rich and Ms. Francis spent several hours at  
10 Beechwood. They looked at a number of records, they met with  
11 Donna Richardson, the Director of Nursing at Beechwood, and also  
12 with Mr. Chambery. They demanded copies of voluminous procedures  
13 and policies related to the nursing home.

14                   And when Ms. Rich and Ms. Francis left, they told Brook  
10:47AM 15 and Donna that they thought there might be potential deficiencies,  
16 but they would have to go back to the office to talk it over. No  
17 specific concern was mentioned, nor any current residents  
18 mentioned in that discussion.

19                   On Monday morning April 19th something out of the  
10:47AM 20 ordinary and very strange happened. Susan Baker, the head of  
21 nursing homes for all of western New York, showed up along with  
22 Liz Rich and Cindy Francis at Beechwood. Ms. Baker had never been  
23 there before. A couple hours later Ms. Carlo, Ms. Baker's boss,  
24 head of continuing care for all of western New York, also came to  
10:48AM 25 Beechwood. She had never been there before.

1           They called it a survey. To Beechwood personnel it  
2 looked like a raid. For no apparent reason, the two highest  
3 ranking nursing home regulators in New York state office, in  
4 Buffalo, were both in the facility along with two Rochester  
10:48AM 5 surveyors.

6           Ms. Baker and Ms. Carlo began making never before heard  
7 demands. They ordered Beechwood staff to stop what they were  
8 doing and to print out and photocopy entire copies of closed  
9 medical records for numerous residents who were no longer at the  
10 facility. Closed medical records, a term that refers to the fact  
11 for that particular resident, they're no longer at the facility  
12 and so the record is closed. There was some discussion about  
13 whose responsibility it was to do all that copying.

14           And then on April 20th the surveyors completed the  
10:49AM 15 on-site survey. They say the survey took place on the 18th -- I'm  
16 sorry, the 19th and the 20th of April.

17           The next day, at the end of the second day of the survey  
18 on the 20th, they completed the on-site portion, they conducted  
19 what's known in the business as an "exit conference." The purpose  
10:49AM 20 of the exit conference is to convey to the facility what they  
21 found, what's wrong, what should the facility be starting to  
22 understand.

23           But at this exit conference they gave Beechwood no  
24 specific information at all. They simply said they had to go back  
10:49AM 25 to the office to discuss things and that there might be potential

1 deficiencies.

2 Two days later, on April 22nd, five of the defendants --  
3 Ms. Baker, Ms. Carlo, Ms. Francis, Ms. Rich, and Mr. Rubin -- came  
4 to Beechwood and conducted another exit conference. To Beechwood  
10:49AM 5 the conference seemed irregular and unusual. Mr. Rubin was the  
6 head of the Department of Health for the region; there was no  
7 reason or need for him to be there. Exit conferences are usually  
8 handled by the surveyors, not by regional level administrators.

9 Indeed, Mr. Rubin had never been at an exit conference  
10:50AM 10 before. To Beechwood it looked way over the top. The defendants  
11 advised Beechwood they intended to cite deficiencies against  
12 Beechwood, and they said that those deficiencies when they were  
13 finally cited, would be at the highest possible level of severity:  
14 Immediate jeopardy citations, sometimes referred to as "IJ,"  
10:50AM 15 immediate jeopardy under DOH lexicon; and at the K grade level,  
16 not A or B or C or D or E or F or G, but K level.

17 Another five days went by. And on Tuesday, April 27th,  
18 Mr. Rubin and Ms. Baker again showed up at Beechwood with three  
19 other surveyors simply to drop off the Statement of Deficiencies.  
10:51AM 20 Once again, there was no apparent reason for Mr. Rubin to be  
21 there.

22 When Beechwood reviewed the Statement of Deficiencies  
23 that they were handed, Brook found indeed it claimed that there  
24 was immediate jeopardy for residents of a facility. And that was  
10:51AM 25 handed to Beechwood by Mr. Rubin on the 27th. The Statement of

1 Deficiencies alleged IJ.

2 Ms. Baker supplied a cover letter along with the SOD.

3 It advised Beechwood that they had been put on the fast track for  
4 termination, meaning that the federal funding for Medicare and  
10:51AM 5 Medicaid was going to be cut off to the facility on May 15th if  
6 the IJ was not resolved. The 15th of May was designated as the  
7 funding termination date if the IJ was not resolved.

8 The IJ allegations, the fast track, the termination  
9 consequences of the IJ were the most serious that Beechwood had  
10 ever been given.

11 Brook and his staff members went immediately to work on  
12 the Statement of Deficiency allegations that had now been laid out  
13 for them doing the two things that every facility's entitled to do  
14 and which they had done consistently in all the prior survey  
10:52AM 15 cycles after receiving a SOD: They went and they extensively  
16 researched the medical records to determine where the SOD  
17 allegations might be mistaken or in error for purposes of  
18 submitting the IDR.

19 They prepared a Plan of Correction as if the SOD  
10:52AM 20 allegations were true, and the IDR materials and the POC were  
21 preliminarily due in just ten days from receiving the document .

22 Brook, the Director of Nursing who I said was Donna  
23 Richardson, and others, they worked enormous hours, they scanned  
24 the records, reviewed and checked the allegations that were made  
10:53AM 25 and they designed the POC.

1                   And on Friday afternoon, May 7th, they faxed  
2 preliminarily Beechwood's IDR materials and the complete Plan of  
3 Correction, and the rest of the IDR materials on Monday, May 10th.  
4 This included statements from the doctors who had cared for each  
10:53AM 5 one of the residents that was named and alleged to have been in  
6 immediate jeopardy. The doctors said that they had found no  
7 significant issues or adverse outcomes related to any of these  
8 cared deficiencies that had been alleged.

9                   Beechwood, having submitted its Plan of Correction and  
10 IDR materials, waited for what they thought was the normal  
11 sequence of events: Scheduling of an IDR conference to sit down  
12 and discuss the situation, and so they began implementing their  
13 Plan of Correction.

14                   On Wednesday, May 12th Ms. Baker, Ms. Francis and  
10:54AM 15 Ms. Rich, along with others, returned back to Beechwood for what's  
16 known as a "revisit survey." They spent all day at Beechwood  
17 observing patient care and looking at the medical records on  
18 May 12th, which we've labeled as survey. They spent all day  
19 there.

20                   And they returned the next morning, Ms. Baker and  
21 Ms. Francis, on the 13th and they advised Beechwood that , in  
22 fact, there was no longer any immediate jeopardy at Beechwood and  
23 that the federal funding termination that was scheduled for  
24 Saturday the 15th was now off. But they told Brook that they were  
10:54AM 25 going to write up a second Statement of Deficiencies, and that

1 this second Statement of Deficiencies -- although they could no  
2 longer allege immediate jeopardy -- would be labeled substandard  
3 quality of care still in play at Beechwood.

4                   And sure enough on Friday the 21st of May, Beechwood was  
10:55AM 5 delivered a new May Statement of Deficiencies, this time alleging  
6 SQC, substandard quality of care, in replacement for the higher IJ  
7 label that had been alleged in the April SOD.

8                   And they issued a new funding termination date not  
9 several months out, but only a month further on for June 17th. So  
10:55AM 10 it had been moved now from May 15th to June 17th as the funding  
11 cutoff termination date.

12                   Once again, having received that second SOD, they spent  
13 exhaustive hours reviewing this 33 page document. There was no  
14 allegation of immediate jeopardy replaced by this lower  
10:55AM 15 designation of substandard quality of care. Beechwood and its  
16 staff checked the medical records and they submitted new IDR  
17 materials to the Department of Health on June 1st. So the second  
18 set of IDR materials and POC went in to the Department of Health  
19 on June 1st.

10:56AM 20                   Once again, they awaited the revisit survey from the  
21 Department of Health as they came back to reinspect. But before  
22 that event ever occurred, the most unusual of all possible events  
23 happened. In early June the Department of Health served Beechwood  
24 with two sets of formal legal papers. The Department of Health  
10:56AM 25 commenced two enforcement proceedings against Beechwood,

1 disciplinary punishment proceedings.

2 The first was they started a court action to throw the  
3 Chamberys out of the management of Beechwood and to install what's  
4 called an "involuntary caretaker," sometimes called a "receiver,"  
10:57AM 5 but the technical name is a caretaker, somebody to operate the  
6 facility in place of the Chamberys.

7 The second set of legal papers started an in-house  
8 Department of Health administrative proceeding. And those set of  
9 papers requested that there be a revocation of the Chamberys'  
10:57AM 10 operating certificate, their license to do business in the  
11 facility.

12 The rest of June was an absolute and unprecedented  
13 whirlwind. On June 10 and 11 Ms. Baker and a team of surveyors  
14 came back to Beechwood to conduct more surveying activities, 10th  
10:57AM 15 and 11th of June. But by that time the formal legal papers had  
16 already been served on Beechwood.

17 And on June 16th, based on the survey activities on the  
18 10th and 11th, the Department of Health actually issued a third  
19 Statement of Deficiencies. This time they could not find any  
10:58AM 20 immediate jeopardy, they couldn't even find any substandard  
21 quality of care. But, nevertheless, they alleged a number of  
22 deficiencies, and that Statement of Deficiencies was served on the  
23 16th.

24 June 17th, the funding termination date that had been  
10:58AM 25 recommended by Ms. Baker came to pass, it wasn't moved, funding

1 was cut off, the Department of Health conducted an immediate  
2 campaign with adverse publicity against the home. The Department  
3 of Health orchestrated a move-out of all the Beechwood residents  
4 at the end of June and early July.

10:58AM 5 Ms. Carlo wrote a letter that went not only to the  
6 Medicare and Medicaid recipients, but to all the private pay  
7 patients telling them they ought to get out because a formal legal  
8 hearing was being started against Beechwood, and the Department of  
9 Health hearing indeed began on June 23rd.

10:59AM 10 The families of the residents you will hear were  
11 incensed: They wrote letters, they called their assemblymen. But  
12 the hearing was scheduled to begin on the 23rd. Family protests  
13 were to no avail, and the Department of Health ultimately revoked  
14 the operating certificate of the facility. Beechwood was closed  
10:59AM 15 and all the residents moved by mid-July.

16 What on earth had happened to the preeminent nursing  
17 home in the area, one of the best in the state within less than  
18 two months' time? It's taken the plaintiffs 13 years, but now the  
19 real behind the scenes of what happened can now be told to you in  
10:59AM 20 this case because the defendants' e-mails and their notes and  
21 their admissions have been uncovered, and they allow plaintiffs to  
22 demonstrate to you that what the defendants did was done with  
23 clear retaliatory motive for their actions.

24 There are several key pieces of evidence I want to  
11:00AM 25 highlight for you. This evidence is going to demonstrate to you

1 the defendants were not just doing their job, as they will claim,  
2 but rather they were taking actions that they would not have  
3 otherwise done but for the fact that Mr. Chambery was their most  
4 vocal, vigorous and successful critic.

11:00AM 5 Item number one, the evidence shows that the defendants  
6 predetermined the punitive outcome, those enforcement actions,  
7 that they were going to take before the survey and SOD were even  
8 done.

9 A recommendation to terminate federal funding or the  
11:00AM 10 recommendation to revoke a facility's operating certificate are  
11 obviously the most severe possible punishments you can impose on a  
12 facility, way more than a fine or a suspension. But defendants  
13 committed to recommending termination and license revocation  
14 before the survey and the SOD. They put the cart before the  
11:01AM 15 horse.

16 Several Department of Health witnesses will describe for  
17 you what the normal enforcement process is. Ordinarily, once  
18 there is no immediate jeopardy in a facility, 180 days or six  
19 months is given to a facility to bring the facility back into  
11:01AM 20 substantial compliance, and only at the end of that time does the  
21 Department of Health then consider what enforcement seems  
22 appropriate for the facility: A fine, suspension, or even in a  
23 severe case, I suppose, a revocation.

24 I'm going to walk you through this calendar of events  
11:01AM 25 one more time, but this time show you the evidence that you're

1 going to hear about what the Department of Health was doing behind  
2 the scenes.

3 The survey was done on the 19th and 20th, but that  
4 Statement of Deficiencies telling Beechwood what they thought was  
11:02AM 5 wrong and what they needed to correct was not served until the  
6 27th. And Beechwood then after that had another ten days before  
7 it needed to send the Department of Health its IDR materials and  
8 its Plan of Correction.

9 But before Beechwood had even been given this Statement  
11:02AM 10 of Deficiencies, Ms. Leeds, Ms. Carlo, Mr. Rubin had enlisted the  
11 help of Department of Health attorney Russell Altone in Albany to  
12 help them plan and carry out the offensive.

13 Because in Albany on Friday the 16th of April,  
14 Ms. Leeds' staff members and Mr. Altone were planning the  
11:02AM 15 enforcement actions against Beechwood even though the April survey  
16 in Rochester had not even taken place yet. No Statement of  
17 Deficiency had even been issued.

18 On April 21st Mr. Altone confirmed that April 16th  
19 meeting in his e-mail. He talked about the unsubstantiated April  
11:03AM 20 complaint at Beechwood, the one that had launched the  
21 investigation. And he asked in his e-mail, how does an  
22 unsubstantiated complaint fit into the bigger picture and the  
23 potential termination that had been discussed on the prior Friday?  
24 Mr. Altone's e-mail on the 21st confirmed the meeting of the 16th  
11:03AM 25 and a discussion about a bigger picture and termination.

1                   On the same day that Mr. Altone was writing his e-mail  
2 in Albany, and before a Statement of Deficiencies had ever been  
3 issued, Ms. Carlo in Buffalo was writing notes about the  
4 conversation with her boss Mr. Rubin. You'll have an opportunity  
11:03AM 5 to actually read Ms. Carlo's notes. She wrote on that same day  
6 Altone involved, termination, new global picture. The 21st of  
7 April.

8                   So you see at both ends of the Thruway, Albany to  
9 Buffalo, there was preplanning of the most severe possible  
11:04AM 10 enforcement already under way before the surveyors had even done  
11 their work or certainly written up and delivered the facility the  
12 Statement of Deficiencies or Beechwood even had a chance to  
13 respond.

14                   On April 23rd, which is still four days ahead of the  
11:04AM 15 SOD, and two weeks ahead of Beechwood's response being due,  
16 Mr. Altone wrote another e-mail. And he said that to his legal  
17 staff subordinates and to Ms. Leeds' staff in that e-mail, he said  
18 that Beechwood was, quote, on a collision course for termination  
19 and revocation.

11:04AM 20                   On April 26th Ms. Leeds e-mailed her boss, who at that  
21 time was the number two man in the Department of Health and was  
22 actually the acting Commissioner of Health, an extraordinary  
23 e-mail that you all will have an opportunity to read. In that  
24 e-mail she said to the second highest ranking person in the  
11:05AM 25 department: Brook, first name basis, is not doing anything to

1 correct and his time is running out. She added, the closure is  
2 going to be tough.

3 On the 26th the Statement of Deficiencies had not even  
4 been given to Beechwood, but Ms. Leeds was already telling  
11:05AM 5 everyone in Albany that Brook's time was running out and the  
6 closure of the facility was going to be tough. The time hadn't  
7 even started to run yet. Beechwood had not even received the SOD  
8 or had a chance to respond to it.

9 On April 29th Ms. Leeds and Mr. Rubin have another one  
11:05AM 10 of their extraordinary e-mail exchanges that you'll have a chance  
11 to read, an e-mail they never intended to come to light because in  
12 this e-mail exchange these ring leaders not only confirmed their  
13 intent to revoke the Chamberys' operating certificate, they  
14 candidly admitted to one another the illegal retaliatory motive  
11:06AM 15 they were seeking for this unprecedented sanction.

16 Ms. Leeds' e-mail complained to Mr. Rubin that Brook's  
17 Langeveld lawsuit three years before had, quote, changed the whole  
18 way we do discharge planning. Three years after the Langeveld  
19 lawsuit she was still fuming about the loss in the lawsuit. She  
11:06AM 20 told Rubin we have to be prepared to revocate.

21 Mr. Rubin responded. Now, he didn't just agree with  
22 Ms. Leeds, he added a confirmation that the revocation was going  
23 to happen and that this would be specifically in retaliation  
24 against Brook for his challenges. Here's what Mr. Rubin wrote,  
11:06AM 25 quote, another advantage on our side is that HCFA will back us all

1 the way. They, too, have been harassed by Chambery. Harassment  
2 being Mr. Rubin's way of referring to Mr. Chambery's protected  
3 exercise of his constitutional rights. Mr. Rubin concluded his  
4 e-mail with the most memorable line in the case, the chickens are  
11:07AM 5 coming home to roost.

6 Item two, the defendants' Statements of Deficiencies  
7 were deliberately trumped up and overstated in order to support  
8 over the top and preplanned enforcement. You're going to see from  
9 the evidence that the defendants took the unsubstantiated April  
11:07AM 10 complaint and inflated it into this allegation of immediate  
11 jeopardy.

12 They alleged immediate jeopardy based on residents who  
13 weren't even at the nursing home, a violation of rules which  
14 Ms. Baker ultimately conceded if you're going to allege immediate  
11:08AM 15 jeopardy to residents, it's going to have to be alleged in the SOD  
16 about residents that are actually residing at the facility.

17 The defendants abandoned their usual process for  
18 evaluating and grading the deficiencies by the surveyors in the  
19 office, and you're going to see their notes showing they upcoded  
11:08AM 20 deficiencies for what they thought were lower deficiencies into  
21 higher deficiencies and that they did this on instructions from  
22 the staff in Albany to reach higher levels, people in Albany who  
23 had never observed the care of the residents and never actually  
24 seen the medical records at the facility.

11:08AM 25 All this was done to escalate the severity of the issues

1 and, of course, to accelerate the timetable for what the  
2 defendants wanted to accomplish.

3 Item number three, the evidence is going to show the  
4 defendants predetermined they would reject categorically and in  
11:08AM 5 total everything that Brook and Beechwood submitted in its IDR and  
6 in its Plan of Correction.

7 Ms. Leeds and Ms. Baker predetermined that when  
8 Beechwood's inevitable IDR materials and the POC came into the  
9 office, they would not put it through the usual review process,  
11:09AM 10 but rather it would be rejected.

11 The IDR and the POC review process were fundamental due  
12 process rights, and they admit that. But the evidence confirms  
13 that at this point there was the perpetration of the central  
14 falsehood that supported the offensive, the falsehood of the  
11:09AM 15 Department of Health's claim that Beechwood and Brook would not  
16 and could not correct deficiencies.

17 Yet in the past Beechwood had always gone through a  
18 systematic review of the POC, and in every case Beechwood's Plan  
19 of Correction had always been accepted.

11:09AM 20 But June -- I'm sorry, spring of 1999 was entirely  
21 different. And the evidence reveals that Ms. Baker decided in  
22 advance to break the rules about the IDR and the POC because,  
23 again, Ms. Baker's notes -- and you will have an opportunity to  
24 read what she wrote on April 29th before Mr. Chambery's IDR and  
11:10AM 25 POC had even come in. It's two days, only two days after the SOD

1 had even been reviewed and more than a week prior to Beechwood  
2 submitting its materials, her notes record how she intends to  
3 handle the IDR. She wrote, don't weaken the case, don't give in  
4 at all.

11:10AM 5 So for Ms. Baker, there was going to be no give in. For  
6 Mr. Rubin, the chickens were coming home to roost.

7 True to her advanced determination, Ms. Baker carried  
8 out the plan not to give in at all, not a single deficiency in the  
9 April, May or June SOD's were rewritten or rescinded to the  
11:10AM 10 slightest degree.

11 The Beechwood submissions, including all those  
12 physicians' pronouncements, there were no adverse outcomes caused  
13 by any failures of care or care concerns were simply ignored. No  
14 POC review in the normal systematic fashion was ever carried out  
11:11AM 15 in the Rochester office. Rather, on May 18th Ms. Baker and  
16 Ms. Carlo simply checked all the boxes on the rejection form and  
17 sent it out to Beechwood. The 18th Beechwood's Plan of Correction  
18 was rejected completely.

19 Ms. Baker and Ms. Carlo refused to discuss any aspect of  
11:11AM 20 the POC's, taking the position it was not their job to tell the  
21 facility how to correct or what to do or to understand what the  
22 Department of Health was saying.

23 Item four, three separate times the defendants faced  
24 clear roadblocks, stop signs, signals to stop what they were  
11:11AM 25 doing, to reconsider this precipitous path that they were on.

1                   On May 11th an extraordinary telephone conference took  
2 place among a dozen Department of Health officials in Albany and  
3 in Rochester that was led by Ms. Leeds. You'll have an  
4 opportunity to see the notes of the defendants that were taken at  
11:12AM 5 that meeting. Ms. Leeds confirmed to everyone in the call that  
6 her plan was to revoke the Chamberys' operating certificate. This  
7 was in the May 11th conference call.

8                   Ms. Baker's notes of the conversation that day were that  
9 Ms. Leeds had announced the plans to revoke were continuing. So  
11:12AM 10 armed with these instructions, Ms. Carlo and Ms. Baker,  
11 Ms. Francis and Ms. Rich went back to Beechwood the next day on  
12 the 12th after the telephone conference for a survey. They spent  
13 a full day at the nursing home, but they discovered or  
14 acknowledged for the first time a glitch in the plan to terminate  
11:12AM 15 and revoke.

16                   Because no one was in immediate jeopardy at Beechwood,  
17 there was no possible justification for severe enforcement action,  
18 revocation or termination on an accelerated timetable. They  
19 reported this to Leeds on Wednesday night or early on Thursday  
11:13AM 20 morning.

21                   On the 13th there's an acknowledgment in the e-mails and  
22 the notes that there is no IJ at Beechwood. But although the  
23 defendants had encountered an important roadblock to signal the  
24 stop retaliation plan, they didn't do that. At 9 o'clock on the  
11:13AM 25 morning of the 13th Ms. Leeds had already devised a modified plan

1 and e-mailed it to all the people involved. You'll read that  
2 e-mail, it was a 9:09 a.m. that morning. The recipients of the  
3 e-mail were told we're going to see if we can continue to make the  
4 case for a caretaker.

11:13AM 5 A caretaker, as I explained to you, is the person that  
6 goes in and substitutes. You pull the Chamberys, kick them out of  
7 the home in terms of operating it and instead you replace somebody  
8 else in there. And after Ms. Leeds said this in her e-mail, at  
9 the very end of the e-mail she also said this is the only part of  
11:14AM 10 the plan that I want not made public.

11 There was not a moment's pause or reflection about what  
12 was going on. Rather, the plan she announced was that there would  
13 be a write-up of that second Statement of Deficiencies. And even  
14 though there was no IJ anymore, the defendants were told that if  
11:14AM 15 they piled up a whole lot of lesser deficiencies, the sheer weight  
16 of those things would be enough to carry the day and justify the  
17 revocation.

18 Ms. Carlo and Ms. Baker were in charge of the  
19 on-the-ground survey efforts at Beechwood and they got the message  
11:14AM 20 and they sprung to action to see that the plan was carried out and  
21 they pulled together a set of new allegations into the May SOD  
22 that was delivered to Beechwood soon thereafter.

23 But a second clear signal to stop was ignored by the  
24 defendants. In another e-mail on the night of May 20th at  
11:15AM 25 6:09 p.m., the day before the SOD for May was going to be

1 delivered, Ms. Carlo wrote what she intended to be a secret e-mail  
2 to Ms. Leeds' chief deputy, a woman by the name of Anna Colello,  
3 whose testimony you will hear about in the case.

4                   She told Ms. Colello that this message, this e-mail  
11:15AM 5 message was shhhhhh, for her eyes only or for Ms. Leeds if she  
6 wanted to share it. Carlo said she had reviewed the May Statement  
7 of Deficiencies that was about to be delivered the next day and,  
8 quote, it really has a lot of holes in it.

9                   It didn't matter. On May 21st the new Statement of  
11:16AM 10 Deficiencies was simply delivered to Beechwood, and Ms. Baker's  
11 letter with that May SOD advised the termination of funding was  
12 now scheduled for June 17th. Still on a fast track, just a month  
13 away.

14                   The third and most definitive roadblock and signal to  
11:16AM 15 stop came just a few weeks later. On June 7th Ms. Leeds signed a  
16 court petition asking for the ouster of the Chamberys and the  
17 installation of a caretaker. She claimed that the residents at  
18 Beechwood were in imminent danger, despite the fact that there  
19 were no longer, by their own admission, any immediate jeopardy  
11:16AM 20 conditions at Beechwood.

21                   She claimed in those papers that the residents were at  
22 the mercy of Brook Chambery, and she asked that the Chamberys be  
23 thrown out and that a caretaker be installed. Ms. Rich and  
24 Ms. Francis signed an affidavit in support of that application to  
11:17AM 25 the Court making the same claims. Those Department of Health

1 claims and Beechwood's vehement opposition set forth in extensive  
2 papers and medical records were reviewed and heard by New York's  
3 Supreme Court Judge Francis Affronti on June 21st. A real judge,  
4 in a real court.

11:17AM 5 The staff at Beechwood were incensed with what the  
6 Department was trying to do, and a display of tremendous support  
7 for their leader and in testimony to what they knew to be the  
8 falsehoods of the Leeds and Rich and Baker claims, all the  
9 off-duty staff members of the facility organized a rally in front  
10 of the courthouse.

11 Judge Affronti's conclusion after reviewing all the  
12 papers was that the Department of Health's request for the  
13 installation of a caretaker and removal of the Chamberys was  
14 unjustified and he denied it. The judge found no imminent danger  
15 to the residents at Beechwood to justify a caretaker, and he  
16 labeled the claims of Ms. Leeds and Ms. Rich and Ms. Francis that  
17 had been made in the sworn affidavits as inconsistent findings.  
18 The judge on the 21st denied the Department's caretaker  
19 application.

11:18AM 20 Under any circumstances other than Beechwood, this kind  
21 of rebuff from a court would be cause for pause, for reflection,  
22 for reconsideration of the merits of your case as to whether you  
23 should go forward or do something else. Not so for Mr. Rubin or  
24 for Ms. Leeds and the defendants. And in a telling e-mail written  
11:18AM 25 the afternoon of June 21st after receiving Judge Affronti's

1 decision, Mr. Rubin wrote to Ms. Carlo and to the DOH press team.  
2 He did not suggest that the Department of Health reconsider its  
3 intentions, but rather he provided sound bites on how the decision  
4 should be ignored and spun. Said Mr. Rubin, the Affronti decision  
11:19AM 5 was merely a technical determination. They told the Department of  
6 Health team to press forward.

7 Three clear roadblocks. Three stop signs. All ignored  
8 in the headlong rush to retaliate.

9 Now, while the caretaker piece of the offensive had  
11:19AM 10 failed, what about the main event? What about the revocation  
11 proceeding that had been started against the Chamberys? Remember  
12 that the defendants had preplanned to do the revocation back in  
13 April, and that Leeds had reaffirmed it in the telephone  
14 conference on the 11th.

11:19AM 15 Well, that part of the preplanning went flawlessly  
16 because the defendants had figured out a way to keep the entire  
17 revocation proceeding in-house at the Department of Health.

18 The Department of Health set up its own internal  
19 administrative hearing process against Beechwood to obtain the  
11:19AM 20 revocation. Ms. Baker had sent to Altone all the information that  
21 had been accumulated for the SOD's, and Mr. Altone and his lawyers  
22 drafted up a statement of charges against Beechwood that  
23 essentially recycled all the same deficiencies that had been  
24 alleged in the April and May SOD's.

11:20AM 25 And they served that statement of charges on Beechwood

1 on June 7th, setting the hearing date for the 23rd of June, just  
2 15 days away, making the highest possible sanction request against  
3 Beechwood: To revoke the operating certificate.

4 Beechwood mounted a vigorous defense to the charges in  
11:20AM 5 the same way that it had worked tirelessly to convince the  
6 Department of Health that it was wrong about the April and May  
7 deficiency allegations. Beechwood nurses came to testify about  
8 the good care that they had rendered to particular residents; the  
9 doctors for all of those residents came and testified about the  
11:20AM 10 good care that had been rendered and the lack of adverse outcomes  
11 tied to any of the supposed violations asserted by the Department.

12 But the peculiar circumstances of this Department of  
13 Health administrative hearing guaranteed that the outcome was  
14 going to be in the Department's favor. The hearing was held over  
11:21AM 15 a series of days in June, July and August.

16 There was no courtroom. The Department of Health rented  
17 a conference room in a downtown building, and a man by the name of  
18 Mark Zylberberg was selected by the Department of Health to hear  
19 the case. He was not a judge in the judicial system, but rather a  
11:21AM 20 fellow Department of Health employee classified as an  
21 administrative law judge. He was a man on the Department of  
22 Health payroll in the same Division of Legal Affairs as  
23 Mr. Altone.

24 Judge Zylberberg was given the job of hearing the  
11:21AM 25 evidence that was presented with the goal of making not a judicial

1 decision, not a judicial judgment, but rather an administrative  
2 Report and Recommendation to his ultimate superior, the  
3 Commissioner of Health.

4 The hearing you will hear was unprecedented in two ways.

11:22AM 5 The revocation proceeding was singular and unique. In all of  
6 their collective years with the Department of Health, none of  
7 those defendants in Rochester or Albany had ever done this before.

8 On the face of it, it was a unique proceeding to obtain  
9 a never-before-employed remedy and it made no sense. Beechwood  
11:22AM 10 had a compliance history that was as good or significantly better  
11 than other nursing homes. There had been no major change in  
12 Beechwood's staffing or personnel or their approach to care in  
13 1999. It was the same people delivering the care.

14 And the Chamberys and the Beechwood staff had been  
11:22AM 15 delivering long-term care for 40 years and rehabilitation care for  
16 over 55 years.

17 THE COURT: Mr. Cooman, it sounds like we're getting more  
18 into argument here than indicating what you expect to show. So  
19 let's try to bring this to a conclusion and avoid what sounds like  
11:23AM 20 closing argument.

21 MR. COOMAN: Very well, Your Honor.

22 The ultimate Report and Recommendation from  
23 Mr. Zylberberg was forwarded to the Commissioner of Health, who  
24 was Antonia Novello. It was her job to make the ultimate  
11:23AM 25 decision. Beechwood submitted hundreds of pages of factual

1 materials and legal arguments. The details of how the Zylberberg  
2 report got to Novello will be part of the proof in this case.

3 Suffice it to say that Commissioner Novello rubber  
4 stamped the report, signed the order that had been put in front of  
11:23AM 5 her and permanently revoked the Chamberys' license to operate.

6 Beechwood was out of business, Brook was out of  
7 business, and Brook's challenges to the authority of the  
8 Department of Health had been successfully suppressed and  
9 punished.

10 Now, all these irregularities and misuses that the  
11 evidence shows you about the regulators' power and procedure --  
12 the preplanning of the offensive, the predetermination of the  
13 outcome before there was even a Statement of Deficiencies, the  
14 upcoding of the allegations to justify the fast track, a refusal  
15 to review in any systematic way Beechwood's Plan of Correction or  
16 the IDR materials, the Department's refusal to stop the revocation  
17 even after Judge Affronti made his ruling and the in-house hearing  
18 and the unprecedented remedy -- all of those constitute evidence  
19 that the defendants were not merely doing their job, but rather  
20 they were retaliating against Beechwood.

21 But plaintiffs' proof in this trial is not confined  
22 solely to those items. Rather, there are three more key pieces of  
23 evidence that provide explicit confirmation that the defendants'  
24 actions were actually motivated by retaliation. The first was  
11:24AM 25 this: After the Department of Health revoked Beechwood's license,

1 the defendants referred the case to the New York Attorney  
2 General's Office, to Mr. Solomon.

3 Mr. Solomon works at the branch of the Attorney  
4 General's Office called the Medicaid Fraud Control Unit, MFCU.

11:25AM 5 They asked that there be additional civil or criminal sanctions  
6 given to Beechwood.

7 The Attorney General, after conducting an extensive  
8 three year investigation that you will hear about, it was  
9 wide-ranging in scope and methodology, you'll hear from  
10 Mr. Solomon that he used trained investigators, auditors,  
11 attorneys; they reviewed all the claims being made by the  
12 Department of Health and all the items listed in Mr. Zylberberg's  
13 report, they scoured all the medical records, did scores of  
14 witness interviews with families of the former residents, with the  
15 residents themselves, the former employees.

16 You'll see that this process that the Attorney General  
17 used was far more extensive and exhaustive than the 56 day survey  
18 process that the Department of Health had used to result in the  
19 Department of Health hearing.

11:26AM 20 And at the conclusion of that three year investigation,  
21 the conclusion of the Attorney General was the opposite of what  
22 the Department of Health had claimed. The report had claimed that  
23 there were inadequate staffing at Beechwood; the Attorney  
24 General's auditors found the staffing at Beechwood exceeded all  
11:26AM 25 applicable standards and guidelines. That there was no cutting of

1       corners at Beechwood to save costs.

2                   And while the defendants claim that the care at  
3       Beechwood was so poor that the revocation sanction had to be  
4       imposed for the first time in history, the Attorney General closed  
11:26AM 5       the case. And his final report was that the care at Beechwood  
6       was, quote, very good to excellent.

7                   Unfortunately, the Attorney General's report came out in  
8       2003, too late to save Beechwood or its displaced staff and  
9       residents. There were other explicit confirmations about the  
11:27AM 10      defendants and what they were doing publicly. You will hear that  
11       the defendants were telling families and the media that they felt  
12       bad, that they were just doing their jobs, that they did not want  
13       to see Beechwood closed. You'll hear them say those things to  
14       you; or they didn't want to see the residents moved. But, in  
15       reality, the defendants were exalting in the demise of Beechwood.

16                  Another deleted e-mail -- we obtained Department of  
17       Health backup tapes -- revealed this exchange between Ms. Carlo,  
18       Ms. Baker and one of their colleagues in Albany. On June 16th,  
19       1999, the day before the HCFA funding was terminated, with the  
11:27AM 20      knowledge that their recommendation to terminate the funding had  
21       been approved, one of Ms. Leeds' central office managers wrote to  
22       Ms. Carlo, quote, amen and hallelujah.

23                  Ms. Carlo shared the exaltation back with Ms. Baker and  
24       responded hot diggity dog, and added 57 exclamation points.

11:28AM 25       Defendant Cynthia Francis was a close confidant of

1 Mr. Rubin in the Rochester office. You'll see that, you'll hear  
2 from the proof in the case very often she would be blind copied on  
3 e-mails that he sent. She spilled the beans about the intent that  
4 she had and that her boss had with respect to the offensive.

11:28AM 5 On April 20th, 1999, the second day of the initial  
6 survey, Ms. Francis pulled aside one of the relatively new  
7 Beechwood nurses, whose name was Gwen Westbrook. Ms. Westbrook  
8 will be here to testify.

9 MR. LEVINE: Objection, Judge. May we approach?

11:28AM 10 (WHEREUPON, a discussion was held at side bar outside  
11 the hearing of the jury).

12 MR. LEVINE: She's not on my witness list. I talked to  
13 her and she said she wasn't advised she was testifying. She's not  
14 on the list they gave us.

11:29AM 15 MR. COOMAN: She's been on the list forever. She was  
16 deposed --

17 THE COURT: She's on my list.

18 MR. LEVINE: You have her on your list? The list of the  
19 witnesses that was given to me by letter outlining the 24  
11:29AM 20 witnesses?

21 MR. COOMAN: You deposed her.

22 MR. LEVINE: That's not the point. There's 24 witnesses  
23 on there and she's not on there. I called her and she said she  
24 wasn't even advised she's testifying. He's now talking about her  
11:29AM 25 being a witness.

1                   THE COURT: I don't have the list in front of me. I  
2 think I identified her yesterday as a witness.

3                   MR. LEVINE: You read all sorts of names, people that  
4 aren't necessarily going to testify. She's not on the list of 24.

11:29AM 5                   THE COURT: I don't have the list in front of me. I'm  
6 not going to delay this, but --

7                   MR. COOMAN: She's a key witness. She's been disclosed  
8 in the case from the beginning. She was deposed. She's going to  
9 testify.

11:29AM 10                  THE COURT: I guess the proof will be whether we see her.  
11 I believe it's on my list, so overruled.

12                  (WHEREUPON, side bar discussion concluded.)

13                  THE COURT: You may continue.

14                  MR. COOMAN: Ms. Westbrook will be here to testify. She  
15 will tell you that Ms. Francis threatened her license and tried to  
16 turn her against Beechwood. She will tell you what Ms. Francis  
17 said to her, and which Ms. Westbrook duly recorded in an affidavit  
18 while it was still fresh and vivid in her memory.

19                  Ms. Westbrook will testify to you that Cindy told me  
20 there's been a problem between Brook and Sandy Rubin, that Brook  
21 had sued Sandy and the Department of Health, and that they were  
22 going to get Brook for it.

23                  Ms. Francis, you will hear, was commended and rewarded  
24 for her role in the offensive. The Department of Health hearing  
11:30AM 25 ended in August of 1999. She was promoted by Mr. Rubin to become

1 program manager for long-term care in Rochester.

2 Like Ms. Francis slipped revealing her true motive,  
3 Ms. Leeds too made a very public mistake that you will hear about.  
4 September 1999, three months after Beechwood was closed, Ms. Leeds  
11:31AM 5 was the head of continuing care, was the main speaker at a  
6 statewide conference of nursing home administrators. Unbeknownst  
7 to Ms. Leeds, one of attendees sitting in the conference was Paul  
8 Kesselring; Mr. Kesselring was Beechwood's former assistant  
9 administrator.

10 Mr. Kesselring immediately reported what he had heard  
11 Ms. Leeds say. He will be here to tell you about the admission  
12 that he heard. He will tell you that Ms. Leeds got up and was  
13 answering questions at the meeting and began discussing the  
14 situation at Beechwood earlier in the summer. He will tell you  
15 that, as best he can recall, her statement said, listen, I'm going  
16 to tell you something, we had to close a facility this year, the  
17 staff at that facility were excellent, it was a horrible situation  
18 that I hope to never go through again. We had to close the  
19 facility for all the wrong reasons and, you know, the staff there  
11:31AM 20 cared unbelievably for those residents. Our surveyors were there  
21 monitoring the whole time. Even though they knew they were losing  
22 their jobs, they continued to provide care right up until the time  
23 the residents left.

24 Mr. Kesselring will tell you there was a break in the  
11:32AM 25 proceedings. Ms. Leeds seemed to be in conversation with her

1 deputy, Anna Colello, at the table. Sometime later in the  
2 conference that afternoon, Mr. Kesselring -- seemingly out of the  
3 blue Laura Leeds returned to the Beechwood subject and she said,  
4 when we closed Beechwood, all the staff weren't really terrific.

11:32AM 5 There were a lot of very serious care concerns and problems that  
6 were legitimate. The administration refused to cooperate.

7 But even the revocation was not enough for Mr. Altone  
8 and Ms. Leeds, and the evidence will show you they decided in the  
9 summer of 1999 to impose the economic death penalty on Beechwood  
11:33AM 10 and the Chamberys as well. With the Department of Health hearing  
11 under way, it became increasingly clear to Brook in his mind the  
12 fix was in.

13 Brook found a buyer for the Beechwood facility, another  
14 respected nursing home operator from the Buffalo area. Meetings  
11:33AM 15 began with the Department of Health about selling the operation.  
16 Mr. Altone refused to allow him the sale unless Beechwood and  
17 Brook would release the Department of Health personnel from  
18 anything that they were doing. There was no authority to impose  
19 that condition, and Mr. Chambery refused to bow to the illegal  
11:33AM 20 request.

21 After the license had been formally revoked later in  
22 1999, Brook tried again. He asked Mr. Altone if he could sell and  
23 transfer the business entity, the establishment of approval that  
24 the Chamberys had held for 45 years. Mr. Altone again said no.  
11:34AM 25 He found a sticky note in his file where he confirmed his view.

1 Beechwood has only bricks and mortar to sell.

2 So this is why Beechwood and Brook and Olive Chambery  
3 have brought this claim seeking justice. 45 years of hard work  
4 and economic value were vaporized, the building is foreclosed and  
11:34AM 5 empty. 113 dedicated healthcare workers had to look for new jobs.  
6 And the residents of Beechwood, against their will, were forced to  
7 find new places to live.

8 The adverse publicity in the media shut down the  
9 facility. It did not just devastate the business, they destroyed  
11:34AM 10 the reputation and career of Brook. He was 47 years old. He was  
11 just embarking on the peak years of a promising entrepreneurial  
12 career, but the defendants stopped him dead in his tracks exactly  
13 as they had planned.

14 The only thing that defendants had not been able to  
11:35AM 15 predetermine, you will see, is that Brook would work tirelessly  
16 for 13 years to finally have this day in court, in a real court  
17 with a real jury to expose the defendants' misconduct and obtain  
18 restitution for the losses.

19 Thank you for your time and attention this morning.

11:35AM 20 THE COURT: Thank you. Ladies and gentlemen, I think  
21 we'll let you step out, stretch your legs before we proceed with  
22 our next matter. The jury can step out at this time.

23 (WHEREUPON, the jury was excused).

24 MR. LEVINE: I have a couple of requests, Judge. Number  
11:36AM 25 one, I would ask that you charge the jury on collateral estoppel

1 with regards to the ALJ decision.

2                   And, number two, I would ask the Court to reconsider  
3 your ruling regarding not allowing the federal ALJ decision in.  
4 It's clear they're attempting to cast light that that decision is  
11:36AM 5 not worthy of belief.

6                   The ALJ decision and the federal system used the exact  
7 same evidence and came up with, as the Court knows, significant  
8 conclusions of problems at Beechwood. They're attempting to cast  
9 light that decision is not worthy of following.

11:36AM 10                   My two requests, respectfully, should be granted.

11                   THE COURT: Well, I think we better proceed with our  
12 openings. I'm not going to charge the jury on anything in the  
13 middle of opening statements.

14                   About the witness, I have document 286, plaintiffs' --

11:36AM 15                   MR. LEVINE: There was a letter that was provided to me  
16 by counsel where it listed 24 names on it. I don't have it -- I  
17 don't think I have it with me. I will certainly obtain it. The  
18 24 witnesses that were listed did not have Ms. Westbrook on it.

19                   THE COURT: How about the formal filing that I got that  
11:37AM 20 has Ms. Westbrook listed -- let me finish. Has her listed as the  
21 third witness. She's not listed for this week, but I read it  
22 yesterday that she was.

23                   MR. LEVINE: There are numerous witnesses or names that  
24 are listed on there that aren't necessarily going to be called.

11:37AM 25                   THE COURT: Explain to me why I should react to document

1 286, which lists in detail all the witnesses? We'll take a few  
2 minutes, and then -- I assume you want the easels down,  
3 Mr. Levine?

4 MR. LEVINE: Yes, thank you, Judge.

11:54AM 5 (WHEREUPON, there was a pause in the proceeding.)

6 THE COURT: Ready for jury Mr. Levine?

7 MR. LEVINE: Yes, sir. Thank you.

8 THE COURT: All right, bring in the jury.

9 (WHEREUPON, the jury is present).

11:55AM 10 THE COURT: All right. Ladies and gentlemen of the jury,  
11 as Mr. Cooman did on behalf of the plaintiffs, Mr. Levine also has  
12 this opportunity to make his opening statement to you about the  
13 case and what he expects the proof to show here.

14 Mr. Levine, you may proceed.

11:55AM 15 MR. LEVINE: May it please the Court, it's still good  
16 morning, members of the jury, my name is Gary Levine, I'm an  
17 Assistant Attorney General for the State of New York. The judge  
18 told you during *voir dire* my boss is a man named Eric  
19 Schneiderman.

11:56AM 20 A new assistant attorney general in our office, that's  
21 Mr. Sheehan, Bernie Sheehan. And Mr. Sheehan and I have the honor  
22 of representing seven people, seven different people, that they  
23 all worked for the Department of Health, they are state employees.  
24 The judge talked to you about under color of law, what they did  
11:56AM 25 was as a state employee.

1           They are accused, and it's an accusation, of violating  
2 the Constitution of the United States. There are lots of  
3 different ways you can be accused under the Constitution: Eighth  
4 Amendment, First Amendment, Fifth Amendment. They're accused of  
11:56AM 5 violating the plaintiffs' right of free speech. Pretty serious  
6 allegations. And over the next several weeks, you're going to  
7 hear evidence as to whether or not my clients should be liable to  
8 the plaintiffs of money damages.

9           If you decide liability, as the judge said, there will  
11:57AM 10 be a second part of the trial regarding damages. But I'm going to  
11 submit to you right now that the evidence will not support a  
12 finding that any of my seven different clients are liable, and the  
13 plaintiffs are not entitled to money damages.

14           I want to introduce to you for the third time -- you've  
11:57AM 15 heard it in *voir dire*, Mr. Cooman referred to them, but I want to  
16 introduce each of my seven clients. And I just have to emphasize  
17 the proof will show although there is some connection because  
18 they're under the Department of Health umbrella, each of the seven  
19 different people have seven different unique facts. One person  
11:57AM 20 doesn't necessarily talk to another person. They're under the  
21 umbrella of the Department of Health, but the Department of Health  
22 and the State of New York are not defendants in this case. Seven  
23 different individual people.

24           You will hear also about other Department of Health  
11:58AM 25 employees that took part in the issues that you're going to hear

1 regarding Beechwood. As the evidence is presented, listen to what  
2 my client, each individual person, said or did. If you're taking  
3 notes, that's where you should make the notes because there's  
4 already things that Mr. Cooman told you about that my clients  
11:58AM 5 didn't say or do. But it's what my clients said or did.

6 So let me introduce to you my clients. Ms. Leeds, right  
7 there on the right, she's the highest ranging DOH official in this  
8 trial. She worked from 1979 to 2000 for the Department of Health.

9 In -- excuse me, in 1998, it's long ago, so I'll trip sometimes on  
11:59AM 10 the 2000s back to 1990s. But in 1999 -- excuse me, 1998, the

11 Department of Health reorganized and created the Office of  
12 Continuing Care and Ms. Leeds was appointed second in command of  
13 that. The initials go by OCC, Office of Continuing Care. Leeds'  
14 responsibility included oversight of many of the departments in  
15 OCC. There's a man that she reported to named Barnett, and  
16 another man above him called Whalen.

17 There is my client Mr. Altone. Mr. Altone's a lawyer.  
18 He worked as a lawyer for the New York State Department of Health  
19 from 1977 to 2010. In 1998 to 2000 Mr. Altone was the Director of  
12:00PM 20 the Bureau of Administrative Hearings for the Department of  
21 Health, Department of Legal Affairs.

22 Now, Mr. Cooman refers to this as not really being a  
23 legitimate legal authority. The evidence will show you that this  
24 is an area called "administrative law." It is a legitimate area  
12:00PM 25 of legal authority.

1                   And Mr. Altone's specific job within the Department of  
2 Health is like a prosecutor's office: He has 25 attorneys and  
3 they prosecute the cases in these administrative proceedings. Now  
4 he's not in front of Judge Larimer or he's not in front of  
12:00PM 5 Judge Affronti. That's not his job, that's not his area of  
6 expertise. His area of expertise is administrative law and his  
7 attorneys prosecuted cases within the administrative law system.

8                   You may hear Hank Greenberg. Mr. Altone reported to  
9 Hank Greenberg. He was the general counsel for the Department of  
12:01PM 10 Health.

11                   Sharon Carlo, Ms. Carlo. Ms. Carlo is a nurse by  
12 training. You'll hear about her incredible resume and the work  
13 she's done before both and after. What you're also going to hear  
14 about is in November of 1998, just before everything started  
12:01PM 15 happening at Beechwood, she came to the job.

16                   She was the Continuing Care Program Director for the  
17 western region of New York. That was an agency of the Department  
18 of Health that oversaw both Rochester and Buffalo. She was  
19 responsible for 161 nursing facilities, as well as all the home  
12:01PM 20 care agencies, assisted living programs, hospice programs and  
21 adult homes in the region. Not just nursing homes, not just  
22 Rochester, she has a broad scope of duties.

23                   When you think of Ms. Carlo's role, it's everything in  
24 the medical care outside of hospitals and primary care facilities,  
12:02PM 25 and her job included oversight of surveys and surveillance of

1 nursing homes in western New York.

2                   Where she fits in this, Carlo reported to Laura Leeds on  
3 matters regarding nursing homes, as well as Robert Barnett in  
4 DOH's Central Office -- you'll hear the phrase "Central Office"  
12:02PM 5 used, that was in Albany -- and with regards to other matters to  
6 Sanford Rubin in the Rochester office.

7                   Reporting to her on the chart, reporting to her would be  
8 Cindy Francis and Susan Baker regarding specifically nursing home  
9 issues.

12:02PM 10                   Mr. Rubin, the gentleman over there, worked at the  
11 Department of Health from 1974 to 2000. In 1985 Mr. Rubin became  
12 the head of the Rochester regional office. In 1999 he was the  
13 acting head of the western region for the Department of Health,  
14 and his duties as the DOH head of the Rochester office included  
15 interacting with the Albany officials that link from the surveyors  
16 and the other officials in Rochester and Buffalo with the people  
17 in Albany.

18                   Now, just an idea of what was on his plate, it wasn't  
19 just nursing homes. He had an Office of Public Health that did a  
12:03PM 20 pure water program and environmental services, sexually  
21 transmitted diseases, maternal and child care. There was another  
22 department called Office of Health Systems Management, sometimes  
23 you'll see in some of the e-mails OHSM. They did professional  
24 medical conduct programs and reviewed physician complaints.

12:03PM 25                   There was the Medicaid Management Info Systems, MMIS.

1 Home health services, emergency medical services, and there was  
2 long-term care. You'll hear about before Ms. Carlo, you'll hear  
3 about a person by the name of Cantaben. Under the program  
4 directors, there's the team leaders and the surveyors.

12:04PM 5 Now, it's important to remember Mr. Rubin is not a  
6 nurse. He's a social worker by training. He doesn't know the  
7 nursing area. They will try to pin it on him. The proof will  
8 show he doesn't know about how nursing works other than a  
9 functional working knowledge based upon his experience.

12:04PM 10 Ms. Baker, Susan Baker. She's not a nurse. In the  
11 previous opening that's almost like a negative. But she's a  
12 certified surveyor. She's a registered dietitian. She has  
13 experience working in hospitals and with consulting and consulting  
14 with nursing homes. And she has a bachelor's degree in nutrition,  
15 and a master's degree in education and food and nutrition.

16 And the feds certified her as a surveyor. She's well  
17 qualified to do her job. She conducted nursing homes surveys and  
18 complaint investigations predominantly in the Buffalo area. She's  
19 a Buffalo person, as is Ms. Carlo.

12:05PM 20 And she became a survey team leader. In 1995 she worked  
21 in Quality Assurance. You're going to hear about quality  
22 assurance issues in this trial. And in April 1998, Baker was  
23 promoted to the Long-Term Care Program Director for the Western  
24 Regional Office, and assumed survey and complaint responsibility  
12:05PM 25 for the 161 nursing homes in western New York. Baker's duties

1 included assigning people on regular surveys as opposed to  
2 complaint surveys.

3 Just so you can follow who goes where, Ms. Baker  
4 reported to Ms. Carlo. Notice I'm sort of going top down.

12:06PM 5 Cynthia Francis, Ms. Francis. Cindy is a nurse. Back  
6 then she had 27 years of experience. She was a federal and is a  
7 federal certified surveyor. Before joining the Department of  
8 Health, Ms. Francis worked as a nurse in long-term care facilities  
9 and in the hospital. She was the person in charge of the  
10 Complaint Unit in the Rochester office and she reported to  
11 Ms. Baker.

12 Ms. Francis, her job would be to take in the complaints  
13 that come into the Department of Health in Rochester. She would  
14 schedule the surveys, and she would bring the serious complaints  
15 to her superiors' attention, that is, Ms. Baker.

16 In the spring of '99, Francis was in her 12th year as  
17 the Department of Health -- as the coordinator of Patient Care  
18 Investigation Unit responsible for investigating complaints of 68  
19 nursing home facilities in the greater Rochester, Monroe County  
20 area.

21 And last, but certainly not least, Mary Elizabeth Rich.  
22 Ms. Rich. Ms. Rich is a registered nurse, nurse practitioner, she  
23 worked in the Department of Health from 1985 until 2000.

24 In addition to her bachelor's degree in nursing, Rich  
25 has a master's in nursing from the University of Rochester, and

1 post-master's certification as an adult nurse practitioner from  
2 the University of Buffalo. In 1999 Ms. Rich had 35 years of  
3 nursing experience when she went to Beechwood and found the  
4 problems that we're going to talk about in a minute.

12:07PM 5 Now, as the judge told you, Mr. Cooman's opening and my  
6 opening are not evidence. It might come across as evidence, and  
7 if you take a couple hours and talk about something and speak  
8 loudly and forcefully, it might sound like evidence. But none of  
9 it's evidence. There might be kernels of truth in things you  
10 hear, but an argument is not evidence.

11 And some statements you heard of in the opening are just  
12 plain wrong. For example, you heard about an e-mail on April 14th  
13 where one DOH person sends a question to Mr. Altone -- not one of  
14 my clients, somebody else. Mr. Cooman refers to that as like it's  
15 an official document of the Department of Health finding that on  
16 April 14th an April survey is unfounded. You will hear evidence  
17 how that is not true.

18 On May 11th there was a telephone conference and  
19 Mr. Cooman said at that point there was already a plan in effect.

12:09PM 20 The lawyers in this case have these iPads and we keep  
21 600 plus exhibits on here. And there was a reference to this  
22 conference and what Laura Leeds said. And I submit to you when  
23 you get this document, what you're going to see is Sue Kelly, a  
24 federal official, asks what's New York State's plan for  
25 revocation? According to Ms. Carlo's notes, she takes a lot of

1 notes, and her detailed notes -- this was some other people are  
2 just jotting things down kind of like what the judge referred to  
3 earlier. The question was asked by Sue Kelly, what's  
4 New York State's plan for revocation? LL: Trying to decide  
12:10PM 5 regarding New York State's plan for revocation.

6 So you might hear in an opening statement this is what  
7 happened, but it's not going to be so clear this is what happened  
8 because there's evidence that totally contradicts what Mr. Cooman  
9 said earlier.

12:10PM 10 You heard about Judge Affronti's decision. There was a  
11 caretaker application. You heard evidence that Judge Affronti  
12 ridiculed the conflicting evidence presented, but when you read  
13 the exhibit and see Judge Affronti's decision, what he said was --  
14 and I think the proof will show this -- in a day or so there's  
12:10PM 15 going to be the Department of Health proceeding and I defer to the  
16 expertise of the Department of Health administrative law judge  
17 that will be hearing this case. Therefore, I'm not going to take  
18 any action. I'm summarizing, but read the exhibit when it's your  
19 turn to read the exhibit.

12:11PM 20 There was a reference to an Assistant Attorney General  
21 Jerry Solomon, and the words that were used -- I wrote them down  
22 -- was it was referred to them for a criminal investigation.  
23 Mr. Solomon's going to come in, Mr. Solomon's going to tell you  
24 there was no referral. He initiated this because he wanted to  
12:11PM 25 look at facilities that were in an IJ situation to see if there

1 was a fraud.

2 And he looked at that case not as presented a few  
3 minutes ago, but he looked at it because he wanted to know if  
4 there was a criminal charge he could bring. And you'll find out  
12:11PM 5 he read the transcript from the administrative hearing, and he did  
6 talk to people, and he decided he didn't want to bring a criminal  
7 investigation.

8 Plaintiffs' counsel may pick apart and put a spin, but  
9 what's ultimately going to bear out in this case is the evidence  
12:12PM 10 you hear, from what you determine is valid and how it fits in.

11 This is going to be a long trial. There is going to be  
12 many witnesses over several weeks. We may be calling 24, maybe 25  
13 witnesses, including all of my clients.

14 Now, I just want to tell you it's not necessarily who  
12:12PM 15 goes the longest, who calls the most witnesses, who shouts the  
16 loudest. It's the quality of the evidence.

17 I may not be calling one additional witness. At the end  
18 of the case, I may just rest. Not because I don't have things  
19 that I want you to hear and see and read and understand, but  
12:12PM 20 because plaintiffs' case, the way they're going to present it,  
21 will include calling all of my clients. And rather than calling  
22 them back at another time, we'll deal with them all at once.

23 The history of this case goes back many years, almost  
24 like a history analysis when you read documents and piece things  
12:13PM 25 together and come to a full understanding about what happened back

1 in the nineties.

2                   In 1955 Mr. Chambery, Senior, Herb Chambery, and his  
3 wife, who is here today, formed a nursing home. It later was  
4 rebuilt, redone, and I just want you to understand there were  
12:13PM 5 three floors. The first floor, what I call "operational," that's  
6 where laundry and the offices were, but the residents didn't live  
7 on the first floor. There was a second and third floor where the  
8 residents lived.

9                   The Chamberys had a son -- you've heard his name, Brook.

12:14PM 10 Mr. Chambery's to my right. Through most of the trial when you  
11 hear Mr. Chambery, the reference will be to Mr. Brook Chambery.  
12 There's also a son Dale; there may be some references to him.

13                   Mr. Brook Chambery, the son, MBA graduate that studied  
14 finance and monetary economics, he will be as much focus of this  
12:14PM 15 case as my clients.

16                   In 1992 when the senior Mr. Chambery became ill, his son  
17 Brook started to take control of the business. When Mr. Chambery  
18 died the next year, although Mrs. Chambery is the owner of the  
19 facility and has the largest share of the partnership,

12:14PM 20 Mr. Chambery, the son, took control of the family business.

21                   Like some family businesses, certainly not all, but like  
22 some, Beechwood went in a different direction under the leadership  
23 of Mr. Chambery. He changed the way Beechwood did business from a  
24 nursing home that just dealt with the elderly to one that took in  
12:15PM 25 rehab, rehabilitation people; seriously ill people coming from a

1 hospital that didn't need full hospital care, but weren't ready to  
2 go home.

3 Over the 1990s Beechwood evolved to having an entire  
4 floor of just rehabilitation patients. So the third floor would  
12:15PM 5 be your -- what I call "elder care;" the second floor would be  
6 your rehab care.

7 That didn't happen overnight. It was a transition. As  
8 people died, their beds were now used for rehab. Sometimes they  
9 would move people out for other reasons, but the point was  
12:15PM 10 eventually by 1999 the second floor was a rehab floor.

11 With the change in the business model came more  
12 complaints. Mr. Cooman alluded to that. There were complaints,  
13 and that's going to be the crux of what happens.

14 Now, you're going to hear about the Department of Health  
12:16PM 15 and the nursing home and the relationship. First off, there's the  
16 federal government that contracts with the state government, the  
17 Department of Health, to do certain things. The federal  
18 government doesn't have enough people to go in and inspect every  
19 nursing home throughout the country. They work with state  
12:16PM 20 governments, and the people at the Department of Health wear two  
21 different hats: A federal hat and a state hat.

22 It may get a little confusing. I'm going to try with my  
23 witnesses to explain the differences, and sometimes there's  
24 different terminologies for similar things. Termination rather  
12:16PM 25 than revocation. Termination would be a federal action;

1 revocation would be a state action.

2 So when you see and hear how does this effect  
3 termination, just understand that there's two different parallel  
4 entities: The state, the feds. The federal government you'll  
12:17PM 5 hear often referred to the agency called "HCFA," HCFA. You will  
6 learn that there's a relationship between the regulated and the  
7 regulators. One, that the regulators in this case, the surveyors,  
8 go to facilities and point out problems.

9 Nobody likes driving down the road back to Elmira and  
12:17PM 10 getting pulled over by an officer who wants to give you a ticket  
11 because we don't like being pointed out, we don't like the  
12 problems that come with the ticket. But the point is that's the  
13 job of the surveyors, and you will learn how there's a certain  
14 tension inherent in that relationship -- not just at Beechwood,  
12:17PM 15 but that's the way the business is.

16 You will learn, and Mr. Cooman had his board up there,  
17 about words like "surveys" and "deficiencies" and "Plans of  
18 Correction" and so on. I don't want to take up an hour and a half  
19 or more of your time going through all that, but we'll work with  
12:18PM 20 our witnesses to explain the different terms so you're comfortable  
21 at the end of this six weeks that you'll know what these terms  
22 mean and you'll be able to use them when it's your turn to  
23 deliberate.

24 You will hear about the relationship not just generally  
12:18PM 25 between the DOH and nursing homes, but specifically as it relates

1 to Beechwood Nursing Home -- 1995, 1996, 1997, 1998 -- the four  
2 years leading up to the 1999 events.

3 You will hear that there was friction, and we'll discuss  
4 that with the witnesses about the issues between the Department of  
12:18PM 5 Health and the nursing home. Just keep this in mind: What's  
6 happening in 1995, 1996, 1997, 1998 is that business model is  
7 changing. It's not just elder care; it's one floor of elder care  
8 and soon to become a whole floor of rehabilitation care.

9 You will see the workings, the evidence will show  
12:19PM 10 workings of a group of people with regards to actions taken  
11 against Beechwood. The witnesses will tell you about events that  
12 happened more than a decade ago -- 1996, 1997, 1998, 1999 -- guess  
13 what? Memories fade over time. You'll hear witnesses say "I  
14 don't recall."

12:19PM 15 But what will be clear is that my clients were  
16 hard-working public servants, working to protect the people in  
17 nursing homes in general and at Beechwood in particular. A  
18 difficult, tough job.

19 Now, much of the evidence you're going to see we're  
12:20PM 20 going to show you on the screens off our iPads are e-mails and  
21 letters. Now, just a note. Think back, put yourself in the  
22 perspective back in 1999, 1998. E-mails were a relatively new  
23 communication tool. But we're going to have the records of their  
24 e-mails and we'll know what was said.

12:20PM 25 But as you're hearing e-mails, seeing e-mails, reading

1 e-mails and memos, you have to take the bits and pieces of what  
2 they say with the events that are happening at the time. You have  
3 to put it in the timeline and understand the chronology how things  
4 fit. What happened in 1998, what happened in 1999, what happened  
12:20PM 5 April 1998, what happened April 1999. And when you piece it  
6 together, they don't necessarily form a link that plaintiff wants  
7 to make you think here's a straight line to the demise of  
8 Beechwood.

9 And, uniquely, one of my clients is a lawyer. He is a  
12:21PM 10 lawyer for the Department of Health. He is called up for advice.  
11 You will see e-mails that a lawyer's giving legal advice,  
12 sometimes talking with other lawyers and coming up with legal  
13 theories, plans, responses to the things they want responded to.

14 You will learn that before -- I'm not sure. In 1995, I  
12:21PM 15 believe it was, there was a letter written by Mr. Chambery  
16 complaining about the surveyors. And Ms. Leeds, this person who  
17 is so bad according to the opening of Mr. Cooman, but Ms. Leeds  
18 said you know what? There's some tension going on here. Let's  
19 send a Buffalo survey crew out. I have my dates wrong, it was  
12:22PM 20 1996 was the letter, 1997 at the annual survey was when the  
21 Buffalo survey team went to Beechwood. Totally different crew.  
22 Not affiliated with the Rochester office. You will hear about  
23 how well -- I'm using that term facetiously -- how well that  
24 survey went and the problems with that survey.

12:22PM 25 The next year, 1998, April of 1998, not your annual

1 survey, there was a complaint survey. You will hear about what  
2 happened in 1998 when there was an IDR. You've heard a little bit  
3 about it, informal dispute resolution. Mr. Chambery shows up,  
4 Janet Engasser, to discuss whether there was a problem -- excuse  
12:22PM 5 me, whether they should change the deficiencies that were cited.  
6 And Mr. Rubin, prophetically in April of 1998, one year before the  
7 problems at Beechwood in 1999, warned Mr. Chambery we have a  
8 problem with your skin care at Beechwood. You'll understand in a  
9 minute how that connects.

12:23PM 10 A man's trying to close them down, but they're giving  
11 him a warning? We got a problem with this, you might want to  
12 address it.

13 Then in the fall of 1998 there's the annual survey.  
14 Wasn't as smooth as plaintiffs' would like you to think, but we'll  
12:23PM 15 hear the evidence from the witnesses. I don't have to go through  
16 it now. But you'll hear the evidence about what happened there,  
17 how it came to a head, and how it was concluded.

18 I just mention that because there's backgrounds, little  
19 slices of history that we have to put together to get to where  
12:24PM 20 we're going.

21 In 1999 the Department of Health closed Beechwood down.  
22 The process started in March 1999 when complaints from family  
23 members of residents and patients about Beechwood called to the  
24 DOH. There were numerous different complaints.

12:24PM 25 Ms. Francis, the head of the Complaint Unit, took one of

1 those complaints -- Mr. Cooman mentioned the man's name, I refer  
2 to him as David M or the initials DM, trying not to use his name,  
3 he's deceased -- but so David M was dead.

4                   And Ms. Rich, who is now assigned by Ms. Francis, goes  
12:24PM 5 and looks at the medical records. Ms. Rich determined there was a  
6 problem at Beechwood. She determined there should be an expanded  
7 sample. That is, she wanted to look at other residents that left  
8 Beechwood and had to go back to the hospitals.

9                   Remember, the idea is they come from the hospital, they  
12:25PM 10 go to Beechwood and then they hopefully go home. She wanted to  
11 see the people that went back to hospitals.

12                   Now, just to tie in with something I mentioned earlier,  
13 there's this supposedly April 15th e-mail documenting how it was  
14 unsubstantiated. Yet on April 15th -- that's an important day in  
12:25PM 15 history, the day the Titanic sunk, an important date in history --  
16 Liz Rich and Cindy Francis are back at the facility and looking  
17 through records.

18                   This wasn't unfounded or unsubstantiated because on  
19 April 15th they were mentioned -- excuse me. On April 15th they  
12:25PM 20 were back at the facility and they were looking through records  
21 and spent the day there doing their jobs.

22                   At the end of the day they go in and talk with Donna  
23 Richardson, the Director of Nursing. And it's a small room and  
24 they have Mr. Chambery join them. Now, what wasn't mentioned in  
12:26PM 25 their opening was on that date Mr. Chambery again loses his cool.

1           We know a year earlier in 1998 he storms out of the IDR  
2 because he was upset with Mr. Rubin saying he supports his nursing  
3 staff's conclusions. A year later there's an argument, a book  
4 slammed, fingers pointed, fists clenched, voices raised. By the  
12:26PM 5 way, that was all done by Mr. Chambery. And he didn't like what  
6 he was being told and he let the two nurses, the surveyors, know  
7 about that.

8           Now, one of the reasons that's important is because you  
9 can think oh, my gosh, the next -- that was a Thursday. The next  
12:26PM 10 week, on Monday, in comes Baker and Carlo. They must have it out  
11 for him. Well, that's an argument, it's not the facts.

12           The proof's going to show that the next week, Monday,  
13 April 19th, 1999, Elizabeth, Ms. Rich and Cindy, Ms. Francis,  
14 returned again to get more medical records from Beechwood. As a  
12:27PM 15 result of the outburst by Mr. Chambery, Ms. Francis' boss  
16 Ms. Baker comes in from Buffalo to show support and be there  
17 because she had it reported to her of this outburst.

18           While at Beechwood on that next day, April 19th, there's  
19 a new confrontation. The surveyors demanding medical records and  
12:27PM 20 there's a dispute, phone calls are made to the federal government,  
21 to HCFA. Mr. Chambery goes and researches the regulations.  
22 Finally, at the end of -- in the afternoon Ms. Carlo arrives from  
23 Buffalo because of this dispute, and the two surveyors are  
24 obtaining the records and giving it to Ms. Baker and Ms. Carlo or  
12:28PM 25 making copies that afternoon, hundreds of pages of medical records

1 that they wanted to review because they expanded the sample to  
2 look at other people that left Beechwood to go back to the  
3 hospital. They go back to the office, records are reviewed. They  
4 find serious problems.

12:28PM 5 On April 22nd there was an exit conference. Baker,  
6 Carlo, Rich, Francis were now joined by Sanford Rubin, the head of  
7 the Western Regional Office. Beechwood was told at that time --  
8 and we'll hear some details of the detailed explanation -- that  
9 they, the Department of Health, found serious problems at  
10 Beechwood. They were told the problems were going to be  
11 classified as immediate jeopardy. Serious stuff.

12 According to Mr. Chambery's testimony, I anticipate  
13 you're going to hear that Rubin, the man who wants to close them  
14 down if you would believe the arguments made earlier, but I think  
15 the proof will show Mr. Chambery was told by Mr. Rubin I don't  
16 believe you can take care of these problems yourself, you might  
17 need some outside help, you might need a consultant.

18 Now, is that advice that you give somebody you want to  
19 close down, or is that advice you want to give somebody to correct  
20 a problem?

21 Remember, a year earlier Rubin is warning we have  
22 serious concerns about your skin care. You're going to see skin  
23 care come up.

24 April 27th the Statement of Deficiencies is delivered,  
25 it's the formal document outlining what on April 22nd was

1 informally told to the Beechwood people.

2 Now, after this conference Rubin, as he did back in  
3 1998 -- let me just back up. April 1998 after Mr. Chambery storms  
4 out of the conference where they're having the IDR, Rubin takes  
12:30PM 5 not pen to paper, but fingers to keyboard and writes to people  
6 about his observations based upon Mr. Chambery.

7 You're going to look closely at what he said, you're  
8 going to look at Ms. Leeds' question that she poses to Mr. Rubin  
9 and you'll be able to analyze that dialogue.

12:30PM 10 Here's a second time now a year later, after Mr. Rubin  
11 has interaction with Mr. Chambery for the second time, where he  
12 writes his thoughts down about what he observed from Mr. Chambery.

13 One of the recipients is Laura Leeds. You'll hear Laura  
14 Leeds gets a lot of e-mails. She's up on the top of the chain,  
12:31PM 15 lots of people copy her in. But she was sent an e-mail, there's a  
16 back and forth dialogue by e-mail, which we're all accustomed to  
17 now, back in 1999 something unique. You will hear on May 7th and  
18 10th Beechwood submits a Plan of Correction.

19 Folks, this is critical. A Plan of Correction, you're  
12:31PM 20 going to hear testimony about what it is and what it should be,  
21 what it should say, and you're going to hear about what this one  
22 didn't say. It's often referred to as a "rebuttal" rather than a  
23 statement as to how they're going to correct.

24 Now, there's a rule, Mr. Cooman alluded to it, the  
12:31PM 25 federal government says you don't have to agree with the

1       deficiencies, but you have to acknowledge how you're going to  
2       correct them. So even if you disagree, you still have to correct  
3       it.

4                   And just think about this, folks. It's about nursing  
12:32PM 5       care and taking care of the people. So the federal rule that the  
6       State was honoring is you may disagree with us, but you have to  
7       fix it.

8                   Now, as a result of the fact that there were (A) serious  
9       problems and (B) uncorrected problems, the surveyors were now  
12:32PM 10      going back to monitor the facility. They're doing that because  
11      there's real live people living there and they want to make sure  
12      they're well-taken care of. The monitoring is finding (A) the  
13      problems that were originally detected are still there, they're  
14      finding new people with the same problems; and (B) they're finding  
12:32PM 15      new problems.

16                  But as a result of the fact that Beechwood would be  
17      losing their federal funding on May 15th, there was a meeting held  
18      and it was decided to take them out of what's called the IJ  
19      status, immediate jeopardy status, and they were put into a  
12:33PM 20      different status, SQC. And the ramifications of that change is it  
21      gave Beechwood another month to correct their problems.

22                  So the fact that they were no longer IJ, but they were  
23      now in substandard quality of care gave them until June 17th to  
24      correct the problems. Remember, they were first told about the  
12:33PM 25      serious problems April 22nd at the exit conference.

1                   So now there's further deficiencies, there's the same  
2 ones, there's more of the same. And now in the May Statement of  
3 Deficiencies it's not suggested that you get a consultant, it's  
4 directed you get a consultant.

12:34PM 5                   You will see evidence that Mr. Chambery was frustrated,  
6 he didn't know how to correct the problems. Another federal rule  
7 is the surveys and the Department of Health can't tell them how to  
8 correct. They can point out this is a problem and that's a  
9 problem, but they can't say here's how we want you to correct it.

12:34PM 10                  That's up to the nursing home operator.

11                   But what they did say is we hear you, you're frustrated,  
12 you don't know how to correct it, get a consultant that will help  
13 you fix the problem.

12:34PM 14                   And despite the suggestions and despite the order,  
15 Beechwood never got a consultant to help them fix their problems.  
16 The facts are going to show Beechwood was given time and then  
17 given more time. Beechwood was advised and then ordered. They  
18 did not get a consultant, and they did not fix their problems. So  
19 May and June more citations, more deficiencies.

12:35PM 20                   Now, before the June 17th deadline there were two court  
21 proceedings. The first one is the State tried to get a caretaker  
22 appointed. This is where someone comes in and runs the facility  
23 and corrects the problems. Interestingly enough, Beechwood  
24 opposed that. Interestingly enough, if the Department of Health  
12:35PM 25                  got their way, Beechwood would still be open because now somebody

1 else would be operating it and making sure that it doesn't close  
2 down.

3                   But the judge said no to the request for the caretaker,  
4 and I mentioned to you before there's a decision -- I believe  
12:35PM 5 you're going to get to look at it and you'll see the full scope of  
6 what the judge decided and didn't decide.

7                   I will submit the evidence is going to show that that  
8 judge deferred to the expertise of another judge, that's the  
9 administrative law judge.

12:36PM 10                  There was a second proceeding Beechwood started, a  
11 federal lawsuit against some of my clients. That lawsuit also  
12 sought to get an injunction; the injunction was denied.

13                  You hear about roadblocks from Mr. Cooman. There was a  
14 roadblock there that nobody responded to on the plaintiffs' side.  
12:36PM 15 Things were allowed to proceed to the Department of Health's  
16 hearing.

17                  On June 23rd, 1999, the administrative hearing started.  
18 There was a judge by the name of Zylberberg who was appointed and  
19 presided. He heard over 30 witnesses, there were 19 days of  
12:36PM 20 testimony, there was about 4,000 pages of transcript, there were  
21 thousands of pages of exhibits.

22                  Now, the interesting thing is back then and in this  
23 trial you will hear about two totally different Beechwoods. You  
24 heard about this wonderful place -- I just wrote down some buzz  
12:37PM 25 words -- innovative, successful, I can't read my own writing --

1 economical, efficient. You'll hear, I think, some witnesses will  
2 talk about it being nice and clean. The ultimate conclusion from  
3 all of these wonderful sounding words is this was a place without  
4 problems ,they took perfectly good care of their residents and  
5 their patients.

12:37PM 6 There's another Beechwood, and that's not one you might  
7 see when you walk in back in 1999 and look around and say this is  
8 a nice clean place, it smells good, the staff seems happy. And  
9 the proof of these problems will come from Judge Zylberberg's 1999  
10 decision where he issues a 96 page report, and I am not going  
11 through 96 pages with you folks, but I just want to pull out a  
12 couple of examples so you understand what I believe the proof will  
13 show so you can see the roadmap and the bigger picture.

14 Resident number 1, David M, the one that caused the  
15 initial Ms. Rich going to the Beechwood facility. Resident number  
16 1, this is from the administrative law judge's decision, was an 86  
17 year old male admitted to Beechwood 9/15/98. He was discharged to  
18 the hospital on 10/1/98 and readmitted to Beechwood on 10/26/98  
19 with Stage IV sacral pressure sores. You're going to hear a lot  
20 about pressure sores. I'm not a doctor, I'm not a nurse, I've  
21 learned a little bit of this term. I think the testimony you're  
22 going to hear about it is it's also known as a bed sore or a  
23 pressure sore, something you get when you're older and you're in a  
24 facility and you're not moved often.

12:39PM 25 That same resident on his return to Beechwood on 2/9/99

1 until 2/16/99 was not seen by a physician, yet he was given a  
2 rectal tube and the administration of oxygen by the nursing staff  
3 without doctor's orders.

4 The judge wrote in his notes, in his decision -- it's

5 called a Report and Recommendation. He writes this Report and

6 Recommendation and then it goes to the Commissioner. He wrote

7 before DM's admission to Beechwood, his family was able to keep

8 the size of the decubitus ulcers relatively constant, under some

9 control and clean. After readmission to Beechwood on 10/26/98,

0 DM's decubitus continued to worsen and increase in size. DM's

1 medical records do not contain regular consistent monitoring of

2 this condition of his Stage IV sacral decubitus. DM's decubitus

3 was frequently soiled and infected.

I'll give you another example. Resident 16A was a

5 stroke victim. On June 10th, 1999, a surveyor heard a resident

6 calling for assistance, asked to be removed from the Century tu

7 which is like a standup tub, where the stroke victim was being

bathed. And the judge wrote, having been in the tub for

approximately ten minutes and having been in the tub unattended

for approximately six or seven minutes, and the judge concluded

regarding Century tubs and the possibility of injury occurring to

22 residents -- plural, more than one -- who are left alone, the

23 Department has shown the elderly, debilitative residents listed

4 excuse me. In relation to this charge did not receive proper

supervision to prevent accidents. Both Nurse Richardson and Nur

1 O'Connor agreed that the Department's surveyor -- agreed with the  
2 Department surveyor that the resident should not have been left  
3 alone and said so to the surveyor at the facility.

4 At the hearing, however, Beechwood insisted on disputing  
12:41PM 5 this common sense requirement. This is one example of Beechwood's  
6 unnecessary and counterproductive stubbornness.

7 Resident 7, an 80 year old female admitted to the  
8 facility on 12/18/98 for rehabilitation following repair of a  
9 right hip sustained from a fall. The resident -- this is the  
12:42PM 10 judge writing, the resident fell a total of four times after  
11 admission to the facility. As a direct result of those falls, her  
12 right hip fracture repair had collapsed and she sustained a new  
13 fracture on her left hip. Beechwood failed to conduct an  
14 appropriate falls risk assessment of this resident despite her  
12:42PM 15 prior history of falls. Beechwood also failed to change DW's care  
16 plan to include appropriate intervention to prevent future falls.

17 Just a couple more. Resident 7A had medical orders for  
18 phenobarbital three times a day in order to treat her seizure  
19 disorder. The resident did not receive five doses of  
12:42PM 20 phenobarbital from 5/2/99 to 5/3/99. The judge concluded  
21 Beechwood failed to provide this resident with the proper  
22 pharmaceutical services.

23 Resident 9, different than resident 1, nursing staff  
24 placed a rectal tube without a physician order. The judge  
12:43PM 25 concluded this is a violation of generally accepted standards of

1 nursing practice.

2                   Resident 3, a 74 year old male, vomited a large amount  
3 of clear yellow liquid, developed a fever of 103.4, was noted to  
4 have excessive nasal mucous. The resident expired on April 4th,  
12:43PM 5 1999. Based upon the above temperatures and symptoms recorded in  
6 WW's chart, the nursing staff should have notified WW's physician  
7 on the evening of March 30th, 1999 or by the morning of March  
8 31st, 1999. The physician was not notified of WW's elevated  
9 temperatures until 4/2/99. Resident 3's physician should have  
12:43PM 10 been notified at the first sign of the significant temperature,  
11 that's 103.4, and the fact that the physician or the physician's  
12 assistant wasn't notified for three days after this resident  
13 developed this fever was distressing. If the septic syndrome had  
14 been treated earlier in the process, there would have been a  
12:44PM 15 greater chance for effective treatment. Thus, the resident's  
16 health was put in jeopardy by Beechwood's failure to notify the  
17 physician so that medical evaluation treatment would be initiated.  
18                   The last resident, 3A, 3A fell and hit her head . The  
19 next day the resident was seen by a physician's assistant and sent  
12:44PM 20 to the hospital. Two days later a family member, the designated  
21 representative, arrived at the facility and found an empty bed.  
22 Beechwood violated more than one subsection of the rules.  
23 Envisioning arriving at a nursing home to visit a loved one and  
24 finding an empty bed is sufficient for me to agree with the  
12:44PM 25 Department that a violation of this section is not just a mere

1 technicality.

2 I can go on. I believe you'll have an opportunity to  
3 read the 96 pages. There are many more examples like the ones I  
4 read. So decubitus, the bed sores, more than one; there's more  
12:45PM 5 than one fall, there's more than one medication.

6 The plaintiffs will attempt to prove it's my clients'  
7 malicious intent that led to the closure of Beechwood. The proof  
8 will show -- the proof will show it will rest solely on Beechwood  
9 and Mr. Chambery.

10 The last charge, charge 13, the judge wrote about the  
11 opportunity to correct. The Department has established that the  
12 facility failed to comply with this regulation. The administrator  
13 did not take the necessary action to correct the deficiencies and  
14 bring the facility back into compliance. The Plans of Correction  
12:46PM 15 submitted were not acceptable, and the monitoring visits revealed  
16 that changes needed had not been made to correct the deficiencies  
17 cited by the Department. The Plans of Correction submitted by the  
18 respondent were denied as events that were found, attacks on the  
19 messengers, parens surveyors, and a barrage of information not  
12:46PM 20 relevant or consequential to the cited deficiencies.

21 The judge continued, the major problem however lies in  
22 Beechwood's management philosophy which appears to be more  
23 interested in arguing and fighting all attempts for compliance  
24 than in actually correcting deficiencies.

25 The charge the nursing home failed to administer in a

1 manner that enabled it to use its resources effectively and  
2 efficiently to attain or maintain the highest practical physical,  
3 mental, psychological well-being of each resident is sustained.

4                   The judge concluded the Department of Health has proven  
12:46PM 5 by a preponderance of the evidence that Beechwood has committed  
6 multiple and serious violations of the cited New York State  
7 regulations and the various standards of practice. The violations  
8 committed by Beechwood were not singular incidents, and when taken  
9 together form a pattern of inadequate care to its residents. I  
12:47PM 10 also considered the respondent showed a clear lack of awareness of  
11 the seriousness of the violations and demonstrated an  
12 unwillingness to correct them.

13                   Mr. Chambery refused to understand, admit and recognize  
14 that his change in facility operations from a traditional  
12:47PM 15 long-term nursing home to a facility providing both long-term and  
16 rehabilitation short-term care involved different levels of  
17 intervention and monitoring.

18                   The population previously served by Beechwood was  
19 comprised of traditional long-term residents with slow  
12:47PM 20 deterioration and chronic illnesses. Now the population included  
21 residents with more acute, rapidly changing conditions.

22                   This change in type of resident was financially driven,  
23 and Beechwood received a higher reimbursement rate for the higher  
24 acuity level resident. While Beechwood accepted the higher acuity  
12:48PM 25 level residents, they did not change their methods of operation,

1 including operation policies, staff, recordkeeping methods and  
2 modes of assessment to reflect the needs of those residents.

3 The sole responsibility for the closure of the facility  
4 rests with its administrator, Mr. Brook Chambery. I do not

12:48PM 5 believe there was any cited deficiency which was uncorrectable. A  
6 number of actions and omissions committed by Beechwood were  
7 dangerous to life, health, safety, and its resident population.

8 The Department has shown that there exists operational  
9 deficiencies in Beechwood which form a pattern of violations of  
12:48PM 10 the standards of state regulations.

11 Forgive me for taking that much time, but it's important  
12 for you to understand that the proof is not going to show that  
13 Beechwood was necessarily this wonderful perfect place.

14 As a result of the violations found by Judge Zylberberg,  
12:49PM 15 he recommended that Beechwood should be fined \$54,000 and its  
16 New York State operating privileges should be revoked.

17 His Report and Recommendation goes to the head of the  
18 Department of Health, Dr. Antonia Novello. She reviewed it, she  
19 said she relied on the expertise of the administrative law judge,  
12:49PM 20 and she signed it, adopted that decision and that decision closed  
21 down Beechwood.

22 That's important to note. That has never been reversed  
23 by any court. That is the decision.

24 You're going to hear about uniqueness, and I am here to  
12:49PM 25 tell you this case is unique, that much I agree with Mr. Cooman.

1 You will hear evidence that it's not often nursing homes get  
2 closed, and I agree. It is not very often.

3 But I think what you're going to hear from my clients is  
4 the fact that any other situation they faced, the nursing home  
12:50PM 5 operator fixed it or got a consultant to fix it.

6 Not in this case. You want to know what's unique about  
7 it? That the serious deficiencies which other places do get cited  
8 for, the serious deficiencies were not corrected.

9 Interesting in this trial the majority of the facts are  
12:50PM 10 not going to be disputed. The events are what they are.

11 Mr. Cooman had his calender, he can point to dates on this date  
12 this happened, on that date that happened. There will be  
13 e-mails -- I'm almost finished, there will be e-mails. They say  
14 what they say. It's not like there's facts in contradiction.

12:51PM 15 This trial is different than most because I'll  
16 guesstimate 90 some odd percent of the facts you will hear you  
17 don't have to figure out what happened. It was written, the  
18 Statements of Deficiencies were delivered. There will be some  
19 things that there will be some differences, but the bulk of this  
12:51PM 20 trial is not about factual disagreement.

21 What you have to assess, and the judge alluded to this  
22 in *voir dire* in his opening comments, is you're going to have to  
23 work on the operation of my clients' state of mind, what motivated  
24 them. Were they motivated because they wanted to go out and get  
12:51PM 25 Mr. Chambery for something that happened two and a half years

1 earlier? Or were they motivated by the fact that some of those  
2 problems and more that they found at Beechwood caused them to do  
3 their job?

4                   The trial is about retaliation. It's not about the  
12:52PM 5 quality of care, but the quality of care that I just spent some  
6 time talking about fits in because it is our defense. (A) we  
7 didn't retaliate, we didn't formulate the intent to retaliate.  
8 And (B) our actions were driven, motivated by the things they saw  
9 in that nursing home.

10                  Plaintiff is not looking in the mirror. Plaintiff is  
11 arguing we're at fault and that's why they were closed, so enraged  
12 by events two, two and a half years ago.

13                  So let's just focus for a minute on what those events  
14 are -- I'm winding down. The first was a 1996 complaint made to  
12:53PM 15 the Department of Health because Beechwood was trying to evict  
16 Mrs. Langeveld from their nursing home.

17                  Now, piece this in with the other things you've learned.  
18 They're trying to free beds up to use for rehab, and they felt  
19 Mrs. Langeveld was ready to leave.

20                  Mr. Rubin and two other Department of Health officials  
21 in 1996 show up at the facility to investigate whether she should  
22 be sent to another type of facility. Now, the two other people  
23 that went with Mr. Rubin are not any of my clients. On November  
24 26th, 1996 -- and I think that's the same day they filed their  
12:53PM 25 lawsuit -- Mr. Rubin sends a letter to Mrs. Langeveld agreeing,

1 agreeing with Beechwood that she should be moved to a different  
2 facility, a lesser care type of facility.

3                   Mr. Rubin wasn't opposed to what they wanted, what  
4 Beechwood wanted. But Beechwood and Mr. Chambery didn't like the  
12:54PM 5 process of how we got there. So he brought an Article 78 lawsuit.  
6 You'll hear a little bit about an Article 78 lawsuit. The proof  
7 will show an Article 78 is where you complain about something that  
8 the government does. It's a way to appeal to a judge when you  
9 don't like something the government does.

10                  It's not like this lawsuit where you say give me money  
11 damages. It would be like the Langeveld lawsuit where you say  
12 they didn't follow the procedure.

13                  Now, the Langeveld lawsuit brought by Beechwood did not  
14 say that Rubin was wrong in his conclusion. They said we don't  
12:54PM 15 like how we got there. It's an important distinction. Get really  
16 upset about being sued, you might be told you're wrong in your  
17 conclusion, but they told him he was wrong how he got there.

18                  Now, on January 3rd, 1997, a Supreme Court justice in  
19 the state system agreed with the Attorney General's Office and  
12:55PM 20 dismissed Beechwood out of the lawsuit. He said you shouldn't be  
21 part of this.

22                  But by that time Mrs. Langeveld is now in this lawsuit,  
23 and the Attorney General's Office and the Department of Health  
24 reviewed the procedure and they found out Beechwood was correct,  
12:55PM 25 they weren't following the federal procedure.

1                   So what they did was they now gave Mrs. Langeveld a  
2 hearing in front of an administrative law judge, which is what the  
3 federal rules require. The irony of this part of the case is the  
4 administrative law judge disagreed with Mr. Rubin and disagreed  
12:56PM 5 with Mr. Chambery and directed that Mrs. Langeveld can stay at  
6 Beechwood. And the ultimate irony is she stayed at Beechwood  
7 until the closure in 1999, so they couldn't evict her.

8                   Now, when we're talking about this lawsuit listen for  
9 evidence connecting my clients with the Langeveld lawsuit, because  
12:56PM 10 in order for there to be a retaliation claim, you got to connect  
11 them with the things that they're supposedly retaliating.

12                   I'll submit to you that the evidence is going to show  
13 five of my clients never knew a thing about the Langeveld lawsuit.  
14 They weren't motivated by it, they didn't know about it.

12:56PM 15                   Two of them did: Leeds, Rubin. And we'll get into and  
16 the evidence will show how, although they may have discussed the  
17 litigation, it wasn't for the purposes of retaliation or more  
18 preparation, planning, being ready.

19                   There's a second action that they claim caused  
12:57PM 20 retaliation. In 1996 and 1997 Mr. Chambery sent letters, mostly  
21 to the Commissioner, but not just to the Commissioner. At that  
22 time the Commissioner's name was De Buono -- you'll see the  
23 letters. One he entitles Report Card on the Healthcare Industry  
24 in New York State. The process with the Department of Health is  
12:57PM 25 when you get these letters -- and it's similar with other

1 departments -- when somebody complains about something, the letter  
2 gets assigned to an appropriate person within the Department of  
3 Health to respond to. Ms. Leeds had the honor of responding on  
4 behalf of the Department on some of the letters.

12:58PM 5 Now, just as only two people knew about the Langeveld  
6 lawsuit out of my seven clients, one knew about the letters:  
7 Ms. Leeds. I don't think the evidence you're going to see over  
8 the next six weeks will connect any of my clients to those  
9 letters.

12:58PM 10 So as you sit here over the next six weeks, think about  
11 the judge's preliminary charge, think about some of the critical  
12 pieces of evidence. Did my clients retaliate? What evidence  
13 supports that?

14 You got to keep an open mind until you go back in the  
12:58PM 15 room and deliberate, but you can start piecing things together in  
16 your mind how they fit and you can think about it.

17 So the question is did Beechwood get closed down because  
18 my seven clients were so angry and so upset over the events that  
19 occurred two, two and a half years earlier that most of them  
12:59PM 20 didn't even know about? Were they part of some grand conspiracy  
21 where Laura Leeds is talking to Liz Rich, the top of the -- no  
22 disrespect to Ms. Rich -- top of the food chain and the lower end  
23 of the food chain of the Department of Health? Were they  
24 conspiring let's go out and get them? Or did Liz Rich get  
12:59PM 25 assigned to do a complaint, go out to the facility, the evidence

1 will show she saw things, she acted on them and that's what -- is  
2 that what led to the demise of Beechwood?

3 Now, at the end of the trial I'll be before you and  
4 Mr. Cooman after me will give our closings and there will be  
01:00PM 5 arguments at that point. And at the end of this trial I'm going  
6 to ask that for each of my clients on that verdict sheet that the  
7 judge mentioned to you, you check off the box for my seven clients  
8 indicating that they are not liable in this lawsuit and should be  
9 dismissed.

01:00PM 10 Thank you all for your attention. Thank you, Judge.

11 THE COURT: Thank you. Let me ask the jury to step out  
12 for just a second and we'll decide what we do next and when we do  
13 it. So step out for a few minutes, folks, and I'll talk to the  
14 lawyers.

01:00PM 15 (WHEREUPON, the jury was excused).

16 THE COURT: The jury's been excused. It's now 1 o'clock.  
17 My preference is maybe we finish for the day, but I'll hear  
18 counsel.

19 MR. COOMAN: Your Honor, if I may? I'd call to your  
01:01PM 20 attention two objections I have in the closing which I did not  
21 feel were appropriate to object to, but rather at the appropriate  
22 time we'll be asking the Court for a curative instruction. That  
23 is, Mr. Levine said two things that I believe are, one, against  
24 the law and, one, sort of against the facts.

01:01PM 25 One is his recitation near the end of his opening about

1 conspiracy and somehow Beechwood was claiming conspiracy among  
2 people and people needed to talk together. We've talked about  
3 this before in chambers, and I'm assuming and hoping that there  
4 will be a curative instruction that says conspiracy is not  
01:01PM 5 something plaintiffs claim. They claim there was joint action,  
6 that there was communication among people. But the notion of  
7 conspiracy does not need to be proved as an element of this case.

8 So I think a curative instruction on that probably  
9 resolves that concern.

01:02PM 10 THE COURT: Well, we will talk about that, but -- I know  
11 we have discussed it, but it's sort of a fine line between  
12 establishing joint action and conspiracy. To me it's synonymous.  
13 Joint action, you take some illegal act.

14 I mean, I think if one person is aware of the improper  
01:02PM 15 motive of another and assists in that, that person can also be  
16 liable. So I don't intend to do anything at this point, I've  
17 noted it and we'll talk about it and see if a cautionary  
18 instruction is appropriate.

19 I actually had it on my list to talk to you about what,  
01:02PM 20 if anything, I should say to the jury about what I just said, that  
21 is, joint action, people joining together to do something. So  
22 something to be discussed.

23 MR. COOMAN: The Court alludes to an important point  
24 there which is I believe Mr. Levine's presentation to the jury  
01:03PM 25 assumed that the law is that each of the defendants must know of a

1 specific retaliatory item by Mr. Chambery, and unless they're  
2 reacting to that specific item, that somehow exculpates them and I  
3 do not believe that's the law and we'll need the right instruction  
4 for them to understand that it could be that various of their  
01:03PM 5 compatriots know about those things, but if they then know that  
6 that actor has retaliated and they're joining in that retaliation,  
7 they don't need to have ever read the letters or have been a party  
8 to the lawsuit. There's an implied element of extra knowledge  
9 there that I believe Mr. Levine was suggesting.

01:03PM 10 One last --

11 THE COURT: As always, if you all suggest cautionary  
12 instructions, it's helpful to the Court if you give me one.

13 MR. COOMAN: Very good.

14 One last thing, Judge, and I guess I'll make the  
01:04PM 15 objection and then perhaps it's really in the nature of a  
16 motion *in limine*. Mr. Levine alluded to this Court's review of an  
17 application in the first 1983 case involving Beechwood back in  
18 June of 1999, and he specifically referred to the fact this Court  
19 denied an injunction and that he made a lot of statements about  
01:04PM 20 that which I do not believe is factually relevant to the case at  
21 all, it should not be alluded to and something needs to be told to  
22 the jury if that were to come up again. I don't even think it  
23 should come up as a matter of proof or factual information.

24 THE COURT: I didn't think we talked about this in our  
01:04PM 25 motions *in limine*, and I don't think -- although my ears perked

1 and I think Mr. Levine said "a federal lawsuit," I don't think  
2 he -- I know he didn't identify me, which is good.

3 MR. LEVINE: Judge, if I may? The facts in the e-mails  
4 that are all intended to show is that there was an application for  
01:05PM 5 federal injunction and the federal injunction was denied. That  
6 was what led supposedly to the e-mails amen, hallelujah, hot  
7 digitty dog. That was the e-mails that precipitated that. That's  
8 why I included it. It was part of the events.

9 THE COURT: Federal lawsuit or --

01:05PM 10 MR. LEVINE: Federal lawsuit. I mean, I can show the  
11 Court. I didn't just make this up and stick it in to cause any  
12 prejudice. It's part of the facts and the continuum of this case.

13 THE COURT: Well, I don't know if we want to litigate  
14 again why the Court denied the motion for temporary relief. But I  
01:05PM 15 have noted it, let me take a look at it and -- I mean, do either  
16 of you think, Mr. Levine, you're going to go more down that road  
17 in terms of what was petitioned and what --

18 MR. LEVINE: No. The point is that there was the series  
19 of e-mails. There was an e-mail, I think by Mr. Rosenthal,  
01:06PM 20 indicating that the injunction was denied and that was passed on  
21 to different people. And, I mean, that's just part of the facts  
22 of this case.

23 THE COURT: Well, to that extent, I guess we can leave it  
24 where it is. And, Mr. Cooman, if you have some language -- or  
01:06PM 25 either of you have some language you think that's appropriate for

1 me to tell the jury about that, so be it. I'll take a look at it,  
2 all right?

3 MR. COOMAN: Thank you.

4 MR. LEVINE: Do we want to just go over what we're doing  
01:06PM 5 tomorrow?

6 THE COURT: Or today. I mean, I think the jury's had a  
7 lot of talking at them, and I think maybe it's getting close to  
8 our break time. Have we heard anything about Brother Rothenberg?

9 MR. COOMAN: I have not. That will obviously be one of  
01:07PM 10 my first calls back at the office.

11 MR. LEVINE: Would you mind e-mailing or letting us know?

12 THE COURT: Hear me out. I don't know if we need  
13 Rothenberg tomorrow --

14 MR. COOMAN: We do not. So let me assure the Court we  
01:07PM 15 have a full day of witnesses that are my responsibility, so we've  
16 got some time.

17 THE COURT: I was going to have the jury call in tonight  
18 or tomorrow morning on the chance that Rothenberg would not be  
19 available and that would disrupt our witnesses --

01:07PM 20 MR. COOMAN: The first three witnesses are all the  
21 Beechwood former employees. The line-up for tomorrow would be  
22 Ms. O'Connor, and then Mrs. Chambery, and Mary Wenderlich and I  
23 have responsibility for all of those and I suspect that's probably  
24 a full day of testimony.

01:07PM 25 THE COURT: Well, all right. Why don't we then have

1 Ms. Rand tell the jurors that we're breaking for the evening, they  
2 should come back at 8:30 in the morning?

3 MR. LEVINE: Thank you, Judge.

4 THE COURT: Then I want to see counsel in chambers about  
01:08PM 5 a matter when the jury is gone, but otherwise we'll resume  
6 tomorrow with the identified witnesses at 8:30.

7 MR. COOMAN: Thank you, Judge.

8 THE COURT: Thank you.

9 (WHEREUPON, the proceedings adjourned at 1:07 p.m.)

10 \* \* \*

11 CERTIFICATE OF REPORTER

12  
13 I certify that the foregoing is a correct transcript to the  
14 best of my ability of the record of proceedings in the  
15 above-entitled matter.

16  
17 S/ Christi A. Macri

18 Christi A. Macri, FAPR-RMR-CRR-CRI  
19 Official Court Reporter

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